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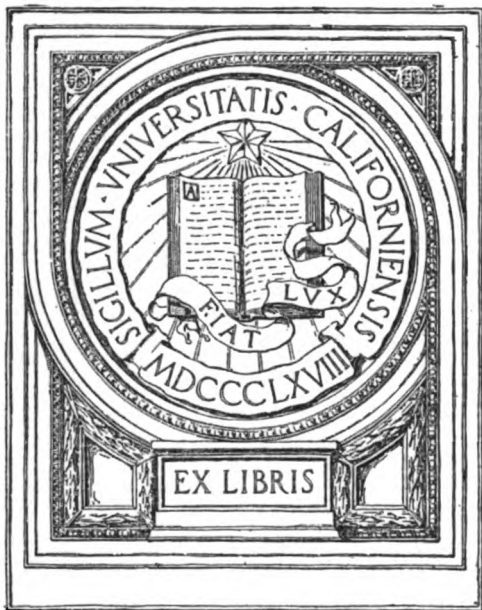
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LEGAL CHRONICLE

REPORTS OF CASES
CALIFORNIA
DECIDED IN THE

SUPREME COURT OF PENNSYLVANIA

AND IN THE COURTS OF THE

FIRST, SECOND, FIFTH, SEVENTH, NINTH, ELEVENTH, TWELFTH,
SEVENTEENTH, TWENTIETH, TWENTY-FIRST, TWENTY-THIRD,
TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-EIGHTH, THIR-
TIETH, THIRTY-SECOND, THIRTY-SEVENTH, THIRTY-
EIGHTH AND FORTY-FIRST JUDICIAL DISTRICTS.

ORIGINALLY REPORTED IN THE LEGAL CHRONICLE

FROM

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BY

SOL. FOSTER, JR.

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TO WHOM
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PREFACE TO FIRST EDITION.

With the initial number of the **LEGAL CHRONICLE**, which appeared January 11, 1873, it was determined to commence the first volume of these reports. This plan enables the reporter to supply many who were not subscribers to the **CHRONICLE** in its first year with all the cases therein reported already bound, with Table of Cases and Index complete.

These cases, as the title page asserts, were decided in the Supreme Court of Pennsylvania, and the courts of twelve Judicial Districts of this State, and, with few exceptions, are published in no other reports. The work was commenced with a view of preserving the labors of some of the most talented Judges in Pennsylvania, which, to a great extent, have been lost to the legal profession. It is with pride that the reporter invites attention to the names of his learned contributors, on another page, nearly all of whom contribute exclusively to this work. The style and form of the **CHRONICLE**, and the general correctness of the reporting, commended the enterprise to the encouragement of these talented Judges, and whatsoever success with which this and future volumes may meet will be attributed solely to the able jurists whose opinions are herein published, and to whom collectively this first volume is respectfully dedicated.

PREFACE TO SECOND EDITION.

After a lapse of ten years, during which these reports have steadily grown in value for reference and citation, it has been found expedient to republish them. The first edition was so soon exhausted and the demand became so general, that with a due regard for the wants of the profession, this reprint was undertaken, and with the hope that they may be found as useful in the future as they have proved to be in the past, the publishers present the second edition.

(iii)

NOTE.

The present edition contains the same cases found in the **LEGAL CHRONICLE REPORTS**, second volume. The star (*) denotes the original paging.

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*TABLE OF CASES.

- Abercrombie's Estate, 333.
 Adams vs. Pittsburgh Ins. Co., 262.
 Administrators, Kramer's, *Kramer vs.*, 110.
 Administrators, McPherson's, *vs. McPherson*, 314.
 Allegheny Ins. Co. *vs. Hanlon*, 270.
 Alter, Focht *et al. vs. Bowman*, 298.
 Anthony, Tyler *vs.*, 15.
 Appeal of Penna. Life Ins. Co., 97.
 Appeal, Taylor's, 76.
 Armstrong & Co. *vs. Walker*, 49.
 Arnold's Administrators *vs. Fitzgerald*, 87.
 Ashton *vs. Dull*, 64.
 Associate Judges, Jurisdiction of, *In re*, 25.
 Auditors of Schuylkill County *vs. Commissioners*, 45.
 Baer *vs. Garrett*, 193.
 Bank *vs. Childs*, 186.
 Bank, Dyer *vs.*, 36.
 Bank *vs. Frazier*, 191.
 Bank, Pottsville *vs.*, 348.
 Bank, Scott *et al. vs.*, 69.
 Bank *vs. Wren*, 274.
 Bashore *et al.*, McHugh *vs.*, 220.
 Baurichter, Christman *vs.*, 73.
 Bell and Weir *vs. Reed*, 266.
 Bennett, Brown *vs.*, 132.
 Bennett *et al.*, Cobb *vs.*, 81.
 Bentley's Estate, 5.
 Biever, Kirkpatrick *vs.*, 272.
 Bigony *vs. Tyson*, 212.
 Bird *vs. Shirk*, 147.
 Birth's Estate, 7.
 Bissell, Lossee *vs.*, 352.
 Boger, Moody & Steinbach, Donough *vs.*, 195.
 Bowman, Alter, Focht *et al. vs.*, 298.
 Breitenbach, Klopp *et al. vs.*, 67.
 Bright & Co. *vs. Oak Dale Mining Co.*, 90.
 Bright, Hewett *vs.*, 345.
 Brinley, Shearer *vs.*, 202.
 Broadhead, Dimmick *vs.*, 126.
 Brock, Emery & Co. *vs. Driebelbies*, 292.
 Brooker *et al. vs. Hamberger*, 96.
 Brown *vs. Bennett*, 132.
 Brown *vs. Commonwealth*, 180.
 Brown *vs. Hambright*, 35.
 Brown *vs. Schock*, 367.
 Brown *vs. Thomas & Blandy*, 162.
 Bucher *vs. Railroad*, 219.
 Burk's Appeal, 116.
 Burr, Schraeder *vs.*, 263.
 Butterfield's Executors, Appeal of, 88.
 *Cake *vs. Stidfole*, 94.
 Cass Township Election Case, 283.
 Ceary, Commonwealth *vs.*, 145.
 Childs *vs. Bank*, 186.
 Christman *vs. Baurichter*, 73.
 City *vs. Elliott*, 105.
 City, Fisher *vs.*, 156.
 City, Heyl *vs.*, 67.
 City, Rose *vs.*, 153.
 City, Wister *vs.*, 66.
 Clapsaddle *vs. Eberley*, 237.
 Clegg *et al.*, Paynter *et al. vs.*, 4.
 Clendenon *vs. Pancoast*, 176.
 Cobb *vs. Bennett et al.*, 81.
 Colner, Vensel *et al.*, 258.
 Columbia Co., Conyngham School District *vs.*, 30.
 Columbia Ins. Co. *vs. Masonheimer*, 223.
 Commissioners, Auditors of Schuylkill Co. *vs.*, 45.
 Commissioners, Yuengling *vs.*, 321, 355.
 Commonwealth, Brown *vs.*, 180.
 Commonwealth *vs. Ceary*, 145.
 Commonwealth *vs. Conway*, 303.
 Commonwealth, Diligent Fire Co. *vs.*, 184.
 Commonwealth *vs. Housekeeper*, 267.
 Commonwealth *vs. Jones*, 238.
 Commonwealth *vs. Camory et al.*, 296.
 Commonwealth *vs. Lindsey*, 216.
 Commonwealth *vs. Magee*, 42.
 Commonwealth *vs. McCuen et al.*, 241.

[* Original Edition, pp. v. and vi.]

(v)

- Commonwealth vs. McGuiness, 40.
 Commonwealth vs. Stuckrath, 338.
 Commonwealth vs. Thompson, 861.
 Commonwealth, Udderzook vs., 200.
 Commonwealth vs. Waleisa, 281.
 Conawingo Petroleum Co. vs. Cunningham, 56.
 Conway, Commonwealth vs., 808.
 Conyngham School District vs. Columbia Co., 80.
 Cooney *et al.* vs. Norwegian Township, 291.
 Crissy vs. Hestonville, M. & F. Railway Co., 75.
 Cummings, Richter vs., 45.
 Cunningham, Conawingo Petroleum Co. vs., 56.
 Curran, Lagrosse vs., 155.
 Curran *et al.*, Locust Mountain Coal Co. vs., 281.

 Dale, Penna. Railroad Co. vs., 177.
 Daris *et al.*, Leonard vs., 182.
 Davis vs. Souder, 55.
 Defrehn vs. Leitenberger, 335.
 De Haven's Appeal, 123.
 Delaware & Hudson Canal Co., Jones vs., 159.
 Derr vs. Greenawalt, 209.
 DeSilver's Estate, *In re*, 95.
 Devers vs. Gething, 60.
 Diligent Fire Co. vs. Commonwealth *ex rel.* Lehman, 184.
 Dimmick vs. Broadhead, 126.
 Donough vs. Boger, Moody & Steinbach, 195.
 Driebelbies, Brock, Emery & Co. vs., 292.
 Drumheller vs. Keim, 21.
 Dull, Ashton vs., 64.
 Dusenberry, Pusey vs., 199.
 Dyer vs. Bank, 86.

 *Eakin, deft., Walter, garnishee, Raub vs., 22.
 Eastwick *et al.*, Whitaker *et al.* vs., 154.
 Eberley, Clapsaddle vs., 237.
 Elliott vs. City of Philadelphia, 105.
 Enterprise Association, 372.
 Ephrata School District, Hummer vs., 37.
 Ernst *et al.* vs. Zerbe, 119.
 Executors, Butterfield's, Appeal, 88.

 Fire Co. vs. Commonwealth *ex rel.* Lehman, 184.
 Fisher vs. City of Philadelphia, 156.
 Fitzgerald, Arnold's Administrators vs., 87.

 Foster, Hummel *et ux.* vs., 218.
 Fox, Singlerly vs., 50.
 Frantz *et ux.*, Warfel vs., 227.
 Frazier, Bank vs., 191.
 Fry's Appeal, 230.
 Fulton Coal Co. *et al.*, Greenough vs., 61.
 Gallagher's Appeal, 217.
 Gallagher's Estate, *In re*, 144.
 Gallans, Hughes vs., 229.
 Garrett, Baer vs., 193.
 Gass vs. Schuylkill Iron Co., 224.
 Gavit vs. Hall, 170.
 Gearhart *et al.*, Railroad Co. vs., 360.
 Gething, Devers vs., 60.
 Glendon Iron Co. vs. Uhler *et al.*, 178.
 Glenn *et al.*, Thompson, assignee, vs., 52.
 Good vs. Grant *et al.*, 175.
 Grant *et al.*, Good vs., 175.
 Graham vs. Walker & Co., 51.
 Greenawalt, Derr vs., 209.
 Greenough vs. Fulton Coal Co. *et al.*, 61.
 Grigg's Estate, 342.

 Hackley vs. Walsh *et ux.*, 198.
 Halberstadt & Wilson, Swain vs., 160.
 Hall, Gavit vs., 170.
 Hamberger vs. Brooker *et al.*, 96.
 Hambright, Brown vs., 35.
 Hanbest, Sheetz *et al.* vs., 103.
 Hanlon, Insurance Co. vs., 270.
 Hannick, Morris *et al.* vs., 187.
 Heckscher & Co. vs. Shenandoah Water Co., 252.
 Heintze & Hanley, Knecht vs., 356.
 Hempfield Township Road, *In re*, 151.
 Hestonville, M. & F. Railway Co., Crissy vs., 75.
 Hewett vs. Bright, 345.
 Heyl vs. City, 67.
 Houck *et al.* vs. Ritter, 257.
 Housekeeper, Commonwealth vs., 267.
 Huber *et al.*, Sheetz *et al.*, 8.
 Hughes vs. Gallans, 229.
 Hummel *et ux.* vs. Foster, 218.
 Hummel vs. Insurance Co., 336.
 Hummer vs. Ephrata School District, 37.

 Incorporation Enterprise Association, 372.
 Insurance Co., Adams vs., 262.
 *Insurance Co.'s Appeal, 97.

[*Original Edition, pp. vii. and viii.]

- Insurance Co. *vs.* Hanlon, 270.
 Insurance Co., Hummel *vs.*, 336.
 Insurance Co. *vs.* Masonheimer, 223.
 Insurance Co., McPhilips *vs.*, 248.
 Iron Co., Gass *vs.*, 224.

 Jermyn *vs.* Moffitt, 169.
 Johnson, Reeser *vs.*, 225.
 Johnson, Smith *vs.*, 270.
 Johnson *vs.* Williams *et al.*, 134.
 Jones, Commonwealth *vs.*, 238.
 Jones *vs.* Delaware & Hudson Canal Co., 159.
 Jurisdiction of Associate Judges, 25.

 Kahler, Seeds *vs.*, 234.
 Keavy, Shissler *vs.*, 39.
 Keim, Drumheller *vs.*, 21.
 Kelly *vs.* Stephens, 308.
 Kimmel *et al.* *vs.* Wagner *et al.*, 106.
 Kirby, Mayor & Morgan *vs.*, 305.
 Kirby *vs.* Railroad Co., 357.
 Kirkpatrick *vs.* Biever, 272.
 Kirkpatrick *vs.* Wensel, 279.
 Kline's Estate, 127.
 Klopp *et al.* *vs.* Breitenbach, 67.
 Knecht *vs.* Heintze & Hanley, 356.
 Kramer *vs.* Kramer's Administrators, 110.
 Kreiter, Miller & Reist *vs.*, 247.

 Lagrosse *vs.* Curran, 155.
 Lanigan, Leib *vs.*, 353.
 Laubach *vs.* Laubach, 104.
 Leech *vs.* Leech, Brokers, Gar-
 nishees, 190.
 Leib *vs.* Lanigan, 353.
 Leitenberger, De Frehn *vs.*, 335.
 Lehman Fire Co. *vs.* Common-
 wealth, *ex rel.*, 184.
 Lensenig *vs.* Thompson, 12.
 Leonard *vs.* Daris *et al.*, 182.
 Lindsey, Commonwealth *vs.*, 216.
 Lippincott *et al.* *vs.* Railroad Co.,
 310.
 Lochiel Iron Co., Providence Co.
vs., 244.
 Locust Mountain Coal Co. *vs.* Cur-
 ran *et al.*, 231.
 Loeb *vs.* Nissley, 149.
 Long *et al.*, Tawney *vs.*, 245.
 Long & McKinney *vs.* Wood, 324.
 Long, Philadelphia Railroad Co. *vs.*,
 78.
 Long *vs.* Rhawn, 65.
 Losee *vs.* Bissell, 352.
 Lutes *vs.* Thompson, 58.
 Lycoming Insurance Co., Hummel
vs., 336.

 Magee, Commonwealth *vs.*, 42.
 "Maggie Cain" Schooner *vs.* Shake-
 speare, 85.
 Maloney, Trimble *vs.*, 118.
 Markley *vs.* Wartman *et ux.*, 168.
 Martz, St. Clair Coal Co. *vs.*, 83.
 Masonheimer, Columbia Ins. Co. *vs.*,
 223.
 Mason's Petition, 109.
 *Mayor & Morgan *vs.* Kirby, 305.
 McCuen *et al.*, Commonwealth *ex*
rel. *vs.*, 241.
 McCullough & Co. *vs.* Thornton,
 321.
 McFerren *vs.* Mont Alto Iron Co.,
 206.
 McGuiness *vs.* Commonwealth, 40.
 McHugh *vs.* Bashore, *et al.*, 2-0.
 McKee, Mercer Mining Co. *vs.*, 359.
 McPherson's, Administrators *vs.*
 McPherson, 314.
 McPhilips *vs.* Cattle Insurance Co.,
 248.
 McShane, Powelton Coal Co. *vs.*,
 164.
 Melick, Satterlee *vs.*, 172.
 Mercer Mining Co. *vs.* McKee, 359.
 Miller & Reist *vs.* Kreiter, 247.
 Mine Hill Railroad Co., Lippincott
et al. *vs.*, 310.
 Mining Co., Oak Dale, Bright & Co.
vs., 90.
 Mishler *vs.* Reed & Henderson, 238.
 Moffitt, Jermyn *vs.*, 169.
 Mont Alto Iron Co., McFerren *vs.*,
 206.
 Morgan's Estate, 194.
 Morris *et al.* *vs.* Hannick, 187.
 Morris, Saylor *vs.*, 215.
 Mortimore *vs.* O'Reagan, 243.

 Nissley, Loeb *vs.*, 149.
 Norwegian Street Widening, *In re.*,
 368.
 Norwegian Township, Cooney *et al.*
vs., 291.

 Oak Dale Mining Co., Bright & Co.
vs., 90.
 O'Brian, Steigerwalt *vs.*, 260.
 Oil Creek Railroad Co., Root &
 Rust *vs.*, 134.
 O'Neill *et al.* *vs.* Wilt, 72.
 O'Reagan, Mortimore *vs.*, 243.
 Orwig, *In re.*, 25.

 Pancoast, Clendenon *vs.*, 176.
 Patterson *et al.*, Trimbath *et ux.* *vs.*,
 226.
 Paynter *et al.* *vs.* Clegg *et al.*, 4.

[*Original Edition, p. ix.]

- Penna. Life Ins. Co.'s Appeal, 97.
 Penna. Railroad Co. *vs.* Dale, 177.
 Penna. Railroad Co., Kirby *vs.*, 3 7.
 Penna. Railroad Co., Vankirk *vs.*, 165.
 Peoples' Bank, Dyer *vs.*, 36.
 Peterman's Estate, 213.
 Peterson & Carpenter, Yeich *vs.*, 249.
 Philadelphia City, Elliott *vs.*, 105.
 Philadelphia City, Fisher *vs.*, 156.
 Philadelphia City, Heyl *vs.*, 67.
 Philadelphia City, Rose *vs.*, 153.
 Philadelphia City, Wister *vs.*, 66.
 Philadelphia & Reading Railroad Co. *vs.* Long, 78.
 Phillips *vs.* Reagan, 84.
 Pittsburgh Ins. Co., Adams *vs.*, 262.
 Plymouth Co.'s Appeal, 130.
 Porter *et ux.*, Purman *et al.* *vs.*, 15.
 Pottsville *vs.* Bank, 348.
 Powelton Coal Co. *vs.* McShane, 164.
 Providence Co. *vs.* Lochiel Iron Co., 244.
 Purman *et al.* *vs.* Porter *et ux.*, 15.
 Pusey *vs.* Dusenberry, 199.
- *Railroad, Bucher *vs.*, 219.
 Railroad Co. *vs.* Dale, 177.
 " " *vs.* Gearhart *et al.*, 360.
 " " Kirby *vs.*, 357.
 " " Lippincott *et al.* *vs.*, 310.
 " " *vs.* Long, 78.
 " " Rice *vs.*, 17.
 " " Root & Rust *vs.*, 184.
 " " *vs.* Seiber, 59.
 " " Vankirk *vs.*, 165.
 " " Venango County *vs.*, 300.
- Railway Co., Hestonville, M. & F. Crissy *vs.*, 75.
 Raub *vs.* Eakin, deft., and Walter, Garnishee, 22.
 Reagan, Phillips *vs.*, 84.
 Red Men's Relief Association, 208.
 Reed and Henderson, Mishler *vs.*, 233.
 Reed, Bell and Weir *vs.*, 266.
 Reeser *vs.* Johnson, 225.
 Rhawn, Long *vs.*, 65.
 Rice *vs.* Railroad Co., 17.
 Riddlesburg Coal Co., Rodgers *vs.*, 240.
 Ritter, Houck *et al.* *vs.*, 257.
 Road in Hempfield Township, 151.
 Rodgers *vs.* Riddlesburg Coal Co., 240.
 Rohrman *vs.* Steese, 102.
 Root & Rust *vs.* Railroad Co., 184.
- Root & Rust *vs.* Railroad Co., 272.
 Rose *vs.* City of Philadelphia, 153.
 Rynd *et al.*, Watson *vs.*, 173.
- Satterlee *vs.* Melick, 172.
 Saylor *vs.* Morris, 215.
 Scheafer *vs.* Smith, 48.
 Schlater *vs.* Winpenny, 100.
 Schock, Brown *vs.*, 367.
 Schofield *vs.* Simpson, 108.
 Schooner "Maggie Cain" *vs.* Shakespeare, 85.
 Schrader *vs.* Burr, 263.
 Schuylkill Iron Co., Gass *vs.*, 224.
 Scott *vs.* Bank, 69.
 Seeds *vs.* Kahler, 234.
 Seiber *vs.* Railroad Co., 59.
 Shakespeare, Schooner "Maggie Cain" *vs.*, 85.
 Shearer *vs.* Brinley, 202.
 Sheetz *et al.* *vs.* Hanbest, 103.
 " " " Huber *et al.*, 8.
 Shenandoah Water Co., Heckscher & Co. *vs.*, 252.
 Shirk, Bird *vs.*, 147.
 Shissler *vs.* Keavy, 39.
 Shiver's Estate, 146.
 Shomo *vs.* Zeigler, 111.
 Simpson, Schofield *vs.*, 108.
 Singlerly *vs.* Fox, 50.
 Sleek *et al.* *vs.* Turner's Assignee, 235.
 Smeigh *et al.*, Titzel *vs.*, 251.
 Smith *vs.* Johnson, 270.
 " Scheafer *vs.*, 48.
 Souder, Davis *vs.*, 55.
 South Creek Township, Tioga county *vs.*, 107.
 South Penna. Iron & Railroad Company, Rice *vs.*, 17.
 State Street, Harrisburg *In re.*, 1.
 St. Clair Coal Company *vs.* Martz, 83.
 *Steese, Rohrman *vs.*, 102.
 Steigerwalt *vs.* O'Brian, 260.
 Stephens, Kelly *vs.*, 308.
 Sterling *vs.* Stewart, 92.
 Stewart, Sterling *vs.*, 92.
 Stidfole, Cake *vs.*, 94.
 Stille's Estate, 349.
 Stuckrath, Commonwealth *vs.*, 338.
 Swain *vs.* Halberstadt & Wilson, 160.
- Tawney *vs.* Long *et al.*, 245.
 Taylor's Appeal, 76.
 Thomas & Blandy, Brown *vs.*, 162.
 Thompson, Assignee, *vs.* Glenn *et al.*, 52.
 Thompson, Commonwealth *vs.*, 361.
 " Lensenig *vs.*, 12.

[*Original Edition, pp. x. and xi.]

Thompson, Lutes <i>vs.</i> , 58.	Walsh <i>et ux.</i> , Hackley <i>vs.</i> , 198.
Thornton, McCullough & Co. <i>vs.</i> , 821.	Walter, Garnishee, Raub <i>vs.</i> Eakin, deft., 22.
Tioga county <i>vs.</i> South Creek Township, 107.	Warfel <i>vs.</i> Frantz <i>et ux.</i> , 227.
Titzel <i>vs.</i> Smeigh <i>et al.</i> , 251.	Wartman <i>et ux.</i> , Markley <i>vs.</i> , 168.
Torbert <i>vs.</i> Yocum, 294.	Watson <i>vs.</i> Rynd <i>et al.</i> , 173.
Tracy <i>et al.</i> , Zimmerman <i>vs.</i> , 277.	Wensel, Kirkpatrick <i>vs.</i> , 279.
Trimbath <i>et ux. vs.</i> Patterson <i>et al.</i> , 228.	Whitaker <i>et al. vs.</i> Eastwick <i>et al.</i> , 154.
Trimble <i>vs.</i> Maloney, 118.	Whitaker, Vanarsdalen <i>vs.</i> , 190.
Turner's Assignee, Sleek <i>et al. vs.</i> , 235.	Williams' Estate, 320.
Tyler <i>vs.</i> Anthony, 15.	Williams <i>et al.</i> , Johnson <i>vs.</i> , 134.
Tyson, Bigony <i>vs.</i> , 212.	Wilt, O'Neill <i>et al. vs.</i> , 72.
Uhler <i>et al.</i> , Glendon Iron Co. <i>vs.</i> , 178.	Winpenny, Schlater <i>vs.</i> , 100.
Udderzook <i>vs.</i> Commonwealth, 200.	Wister <i>vs.</i> City, 66.
Vanarsdalen <i>vs.</i> Whitaker, 190.	Wood, Long & McKinney <i>vs.</i> , 324.
Vankirk <i>vs.</i> Railroad Company, 165.	Wren, Bank <i>vs.</i> , 274.
Venango county <i>vs.</i> Railroad Company, 300.	Yeich <i>vs.</i> Peterson & Carpenter, 249.
Vensel <i>et al. vs.</i> Colner, 258.	Yocum, Torbert <i>vs.</i> , 294.
Wagner <i>et al.</i> , Kimmel <i>et al. vs.</i> , 106.	Yuengling <i>vs.</i> Commissioners, 321, 355.
Waleisa, Commonwealth <i>vs.</i> , 281.	Zeigler, Shomo <i>vs.</i> , 111.
Walker & Co., Graham <i>vs.</i> , 51.	Zerbe, Ernst <i>et al. vs.</i> , 119.
	Zerbe <i>et al. vs.</i> Zerbe <i>et al.</i> , 287.
	Zimmerman <i>vs.</i> Tracy <i>et al.</i> , 277.

[Original Edition, p. xi.]

LEGAL CHRONICLE REPORTS.

Twelfth Judicial District.

Court of Quarter Sessions, Dauphin County.

In re STATE STREET, HARRISBURG.

A title which calls the bill a supplement to another bill, which has no other title than of the same kind, a supplement to an original bill does not *clearly* express the object of the law and imparts no information to the legislature which is called upon to enact it.

The act of January 2, 1871, entitled "A further supplement to the act incorporating the city of Harrisburg, in the county of Dauphin, passed April 9, 1869," is defective in title, contains several distinct subjects and is unconstitutional and void.

In the matter of damages claimed for the opening of State street. Opinion delivered *December 27, 1873*, by

PEARSON, P. J.—On the 24th day of May, 1871, an act of assembly was passed authorizing the common council of the city of Harrisburg to open State street from the canal to the city limits, etc.

Viewers were appointed by an ordinance of the city authorities to ascertain and assess the damages occasioned by reason of such opening.

On the 26th day of July, 1873, the viewers made report to the council, showing that they had viewed the ground and with a single exception allowed no damages. The parties who considered themselves injured brought the whole proceedings into the Court of Quarter Sessions by petition, and nearly all of those whose property was taken have filed exceptions to the action of the viewers. We will take up the exceptions filed in a single case, believing that it will be decisive of all.

Samuel H. Simon shows that he had a valuable brick manufactory on the ground where this street was opened, costing some \$4,700 to construct. The viewers allowed him no damages for its destruction, believing, as they show by their report, and as is clearly proved, that they only allowed "for lands taken," nothing for buildings taken or destroyed. This is clearly erroneous. The houses, barns or factories are as much real estate as the land on which they are erected. This error runs through their whole report as to each person's property, and in this particular would cause it to be set aside. We are asked to declare the law under which these viewers were appointed and acted unconstitutional and that there was no authority for opening the street. The act of the 24th day of May, 1871, confers on the council of the city full power

[*Original Edition, p. 1.*]

(1)

to open and grade State street, from the canal to the city limits, and all of this property lies between these points. That act is constitutional. The substance of the statute is clearly expressed in the title, and it relates to a single subject.

The enactment of January 2, 1871, under which the viewers were appointed, calls for more careful examination. By the amendment to our State constitution, adopted in 1864, it is declared that "no bill shall be passed by the legislature containing more than one subject, which shall be clearly expressed in the title, except appropriation bills." The title of this bill is "A further supplement to the act incorporating the city of Harrisburg, in the county of Dauphin, passed April 9, 1869." This title certainly does not very "clearly" indicate the contents of the bill. Since the adoption of this amendment it is well settled that the title is part of the law, and in the course of its passage through the legislature is a most essential part. See *Pennsylvania Railroad Company vs. Riblet*, 16 P. F. Smith, 164; *Eby's Appeal*, 20 P. F. Smith, 311. It is a little difficult to understand how a title which calls the bill a supplement to another bill, which has no other title than of the kind—a supplement to an original bill—clearly expresses the object of the law. How can it possibly impart information to the legislature, which is about to enact it, or to the people who are interested in preventing or accelerating its passage? The courts of various States, in putting a construction on the clauses in their constitutions, very similar in expression, have declared such to be the object. It was designed to prevent the passage of laws, the subject of which was unknown to a large portion of the legislative body, and to enable the people, whose interests or rights were about to be affected by the enactment, to know by the published title what was before the legislature, and take the necessary steps to oppose it if injurious. See the collection of the cases and reasoning of the courts in *Cooley's Constitutional Limitations*, from page 141 to 151, and decisions there cited.

Our own constitution is rather more emphatic than most others, as it declares that the subject of every bill "shall be clearly expressed in the title," the word clearly being omitted in the constitutions of many of the States; yet in nearly all of them it has been held that the subject or object of the bill must be set forth.

We consider that the title to this act is the same as none. It indicates or expresses nothing—a supplement to a law without a title and containing several distinct subjects. By looking back through the law to which it was supplemented we would gather no information.

Unfortunately, the amendment to the constitution did not lead to a corresponding change in the preparation of bills. Although the amendment most emphatically declares that the subject-matter shall be distinctly set forth, yet they continued to be reported as before. Those who prepared them either did not know of the change in the organic law or disregarded it. Can the courts, whose duty it is to support the constitution and see that it is properly interpreted and enforced, show the same supine negligence? Considering the vast number of laws enacted within the last nine years

[*Original Edition, p. 2.]

in plain violation of the letter and spirit of the constitution, and the confusion which may arise from declaring them a nullity, the judiciary might well pause before setting them aside. In our *opinion we have no discretion. We cannot say that those already enacted shall stand good, but all such shall be void in the future. The same interpretation which is given to the amendment of 1864 must be put on precisely similar words found in the constitution just adopted, and the people will thereby be deprived of all knowledge of the contents of the bill from reading the title, which alone is published in the newspaper press. The legislature may know of the contents from the new system, but the people will be left in equal ignorance. Nor can the judiciary of this State declare, as was done in Ohio and California, that this is merely directory on the legislature, which it may disregard or carry out at its option. If such interpretation is to be given to this provision, why may it not to all others? and an optional constitution is the same as none. We are therefore clearly of the opinion that the whole of this law is void for want of setting forth the subject-matter in the title. We do not say that the title must be an epitome of the bill, but it must at least refer to its various subjects, so that they may be known and understood.

There is another objection to this statute—it contains several dissimilar subjects. The first section relates to that recited in the beginning of the act to which it is supplemental—it directs the plot there ordered to be made to be filed of record. The second section is dissimilar; it points out a new mode of opening and assessing damages arising from the streets; directs them to be opened on the petition of those owning 200 feet of the ground on the same street. It changes the number of viewers and the mode of their appointment, requires the damages to be paid by those owning 200 feet of property in any direction from the place opened, gives an appeal to any three persons injured, but not to any one. In another section it authorizes the city council to open Front street and fixes quite a different mode of paying damages thereof. The fourth section declares the title to all land already taken by the city, or which shall hereafter be taken, to vest in fee simple, giving the city authority to sell it in fee, although it had but a previous right of way. The next section requires another municipality, the county of Dauphin, to build and keep in repair a bridge within the city for the use of the travel thereof.

Leaving out of view the manifest injustice and probable unconstitutionality of several of these provisions with which the court has at this time no concern, we cannot help thinking them different and incongruous subjects, and therefore the statute is void under the provision that it shall contain but one subject. It is true it all relates to the city of Harrisburg, which Mr. Justice Read considered enabled the bill to embrace everything relating to Forest county. See *Blood vs. Merullott*, 3 P. F. Smith, 391. This case, Mr. Justice Agnew said, in *Dorsey, McMuhlin & Downdley's Appeal*, as reported in *Legal Intelligencer*, November 27, 1872, "is, on the borders of the constitution, a very close case," etc. In our opinion it is far

[*Original Edition, p. 3.]

beyond the borders, not by having two subjects in the bill, but because *one, and much the most important one of them is not embraced in the title. We think that Judge Read was misled by the decisions of the courts in some of the other States whose constitutions are expressed in quite a different language from ours on this subject.

The decision of Judge Agnew, the present chief-justice, in the passenger railway case already cited, goes far to authorize our course of reasoning in the present case. In declaring this law void on account of the defective title, or the want thereof, we are well aware that it may have a serious effect upon other statutes, especially on many relating to this city, but nevertheless we are bound to declare the meaning of the constitution, without regard to the consequences. So far as regards the present statute it is of little moment. We have already said that the city council had the right to open State street, and there is no difficulty in assessing the damages under the 35th and 36th sections of the act incorporating the city. The people and the city will be put to little or no inconvenience. We regret being obliged to throw any obstacles in the way of city improvements, but it is time that the legislature would adopt a more intelligible system of legislation, and at least bring it within the requirements of the constitution. It is lamentable that persons so incompetent to prepare laws should be intrusted to frame those intended to regulate the business of this city. Their formation should have been given over to their solicitor, or some other competent and careful lawyer. The report of the viewers is set aside on the exceptions filed.

First Judicial District.
Court of Common Pleas of Philadelphia.

PAYNTER *et al.* vs. CLEGG *et al.*

An Injunction will not be continued against a corporation merely because a dispute has arisen as to the election of directors who have not yet even taken their seats.

Opinion delivered December 20, 1873, by

PAXSON, J.—This was a motion to continue a special injunction. The act of 16th June, 1836, conferring equity powers upon the courts, expressly provides, that they shall have "The supervision and control of all corporations other than those of a municipal character." To what extent and in what manner such jurisdiction shall be exercised must, in many instances, be determined by the sound discretion of this court, under the circumstances of the particular case.

We will not stop to inquire whether, as was suggested by the learned counsel for the plaintiffs, our supervision of private corporations is of a paternal character. A case might perhaps arise of such confusion in the affairs of a corporation as would justify the court in interfering in a paternal spirit for the common good, and staying the hands of a party or *division of its members until order could be restored. We do not see anything in the affairs of this building

[*Original Edition, pp. 4 and 5.]

association to indicate that it has fallen into hopeless confusion. That some feeling exists among a portion of the members, and that there is a pending contest over the election for secretary and two members of the board of directors is apparent. An injunction is not the remedy for the latter difficulty. It would strike this corporation as with paralysis, suspending the collection of its dues and the transaction of its ordinary business during the tedious progress of a suit in equity. And for what end? merely to settle a dispute as to the election of the secretary and two out of the twelve directors.

The plaintiffs have not only mistaken their remedy, but they have been premature. The evils complained of are only threatened. The directors, as to whose election the dispute has arisen, have not yet been admitted to their seats in the board; we cannot assume in advance that they ever will be admitted in violation of law and the rights of other corporators. If, hereafter, any person shall be found usurping the functions of an officer of this corporation, the writ of quo warranto is a convenient and fitting remedy. The Supreme Court decided, in *Updegraff vs. Crans*, 11 Wright, 103, that it was the appropriate statutory remedy, and ousted the equity jurisdiction of the court. It has the advantage of not bringing the entire business of the corporation to a standstill pending an unimportant election contest.

A bill in equity is not a panacea. It is a specific remedy, to be administered only in particular cases.

The motion to continue the special injunction is denied.

C. H. Gross and *Thos. J. Barger, Esqs.*, for plaintiff.

E. Spencer Miller, Esq., for defendant.

Orphans' Court of Philadelphia.

ESTATE OF ELIZABETH BENTLEY, *Deceased*.

After twenty years it is the presumption that an administrator's account is duly settled, and the burden of proof is on the complainant to overthrow this presumption.

Opinion delivered December 20, 1873, by

PAXSON, J.—This was a citation upon Ann Catharine Bentley and David B. Bentley, executors of the last will and testament of David Bentley, deceased, who was the executor of Elizabeth Bentley, deceased, to show cause why they should not file in the proper office of the account of David Bentley, as executor of Elizabeth Bentley.

The said Elizabeth Bentley died in the year 1836, and letters testamentary were granted upon her estate in the same year to the above-named David Bentley. The latter died in the year 1857, and letters testamentary upon his estate were granted to the above-named respondents. *It was further alleged that no settlement or account of the estate of Elizabeth Bentley, deceased, had ever been filed by the said David Bentley in his lifetime, or by his executors since his death.

[*Original Edition, p. 6.]

The respondents answer, alleging that the estate of said Elizabeth Bentley has been fully administered, and denying that they have any assets in their hands, as executors of David Bentley, belonging to the estate of Elizabeth Bentley. They further claim the benefit of the presumption of settlement raised by the lapse of time, and deny their liability to account.

Depositions were taken on the part of the petitioner to rebut this presumption. The testimony adduced, however, is of a vague and unsatisfactory character. It is open to the further and more serious objection that the admissions relied upon do not come down to a later period than 1844. From that date to the present time no admission by the said David Bentley, nor by his executors since his death, has been proved of any assets unadministered in his hands belonging to the estate of Elizabeth Bentley, deceased.

Under these circumstances, are the respondents liable to account? The general rule in regard to presumptions is briefly stated in *Fbulk vs. Brown*, 2 Watts, 209: "After a lapse of twenty years, all evidences of debt excepted out of the statute of limitations are presumed to be paid. Within the twenty years the onus of proving payment lies on the defendant; after that time it lies on the plaintiff to show the contrary." The liability of executors to account after twenty years was fully considered in the case of *William Brown's Estate*, 8 Phila. R. 197; the judgment in which case has since been affirmed by the Supreme Court. It was there held: "If an executor or administrator be cited to account more than twenty-one years from the grant of letters testamentary, or of administration, he may reply to the citation that twenty years having elapsed since he might have been called upon to account, the law presumes that he settled an account within one year, and distributed the estate among those entitled thereto. By the law of this State, an executor is entitled to one year to settle his account; during that period he cannot be cited unless for misconduct, and it would seem that the presumption would commence to run from the expiration of the year, or the time when he might have been called upon for an account. But it is only a presumption, liable to be rebutted by proof that in point of fact no account has been filed and no distribution made, and when overthrown by such evidence, the liability to account remains in full force. In this, it is unlike the statute of limitations, which interposes a flat bar to a recovery after the statutory period. The practical effect of the presumption is to shift the burden of proof."

After twenty years, the presumption gathers strength with every succeeding year, and requires a corresponding increase in the weight of the evidence to overthrow it, until by lapse of time that which was originally a presumption of law and fact, liable to be rebutted, becomes a *presumption of mere law, and is conclusive. For the time must come in every human transaction when litigation shall end, otherwise there would be neither peace in this world for the living, nor safety for the estates of the dead. It is now thirty-six years since the executor of Elizabeth Bentley might have been called upon for an account. The Orphans' Court, in the exercise of its equity powers, ought not to be "swift to hear" the stale com-

[*Original Edition, p. 7.]

plaint of a litigant who has slept upon her rights for this long period, and who comes into court only when he who might have answered her allegations has been in his grave for sixteen years. His books and vouchers may be lost or destroyed; some of his witnesses may be dead, while the facts may have faded from the recollection of such of them as may be living. It would be a hardship to compel an account under such circumstances; it might do serious injustice.

The burden of proof to overthrow the presumption is on the complainant; she has not succeeded, and her petition must be dismissed.

S. N. Rich, Esq., for petitioner.

Thos. Greenbank, Esq., for respondent.

Eleventh Judicial District.

Orphans' Court of Luzerne County.

In re ESTATE OF JAMES BIRTH, Deceased.

Where a will provides that an executor is "to have the control and management of all the affairs of the farm devised, and of keeping together the property during the life of the widow, and keep her provided for so long as she shall live or remain his widow, and to sell and dispose of such property as may be in the judgment of the executor necessary, from time to time, in the management of the farm and for the comfortable support of the widow, and as soon as she ceases to be his widow the property is to be sold and the proceeds divided equally among his children and heirs, the same as at her death," etc., upon an election by the widow not to take under the will, upon the application of one of the heirs, an inquest was awarded.

Petition for partition of real estate. Opinion by

DANA, J.—The husband of one of the decedent's daughters—she assenting thereto by paper filed—petitioned in right of his wife for partition. An inquest was awarded and the return made, and set aside for defect in giving notice. The application for partition is renewed.

The executor objects to the award of an inquest, and submits a copy of the decedent's will, which provides that his widow is to reside on and have her living and support out of his real and personal property during her life, or while she remains his widow. The executor named "to have the control and management of all the affairs of the farm and of keeping together the property during the life of my wife Sarah, and keep her provided for so long as she shall live or remain my widow, and to sell and dispose of such property as may be, in his judgment, necessary, from *time to time, in the management of the farm, and for the comfortable support of my wife. But as soon as she ceases to be my widow, then the property is to be sold, and the proceeds divided equally among my children and heirs, the same as at her death, except my son Hiram," who is to receive \$200 less than the others by reason of advancements made to him. The widow elected not to take under the will.

James Birth died May 25, 1868, prior to the act of 20th April, 1869, P. D. 1554, relative to dower.

[**Original Edition*, p. 8.]

The care, control and management of the property by the executor, authorized under the will, seems to have been chiefly for the purpose of furnishing a comfortable support for his widow. She has elected to relieve him of her charge, and to claim her rights under the law, and not those secured to her by the will, a contingency not contemplated or provided for by the testator.

She is not dead, nor has she ceased to be his widow, and if a power in the executor to sell can be inferred from the terms of the will, the time for its exercise has not arrived, nor will it until, by death, she shall cease to have occasion for a share in the estate, or, by her marriage, to have a right to it.

There is not, as in *Selfridge's Appeal*, 9 W. & S. 55, a devise of the land to the executor; he is simply entrusted with its management for a purpose which has ceased to exist, and his objection to the present proceeding, on the ground that he is directed by the will to keep the property together, seems to be without force.

The widow concurs in asking for partition. The policy of her course in declining to take under the will, or whether she has sacrificed a comfortable for a wholly inadequate support, is for her, not our, determination.

No question of her sanity is raised by proof or sufficient allegation. Until confirmed the partition will be open for exceptions.

No adequate grounds against the same being shown the alias inquest, as prayed for, is awarded.

Geo. B. Kulp, Esq., for petitioner.

Messrs. Rhode & Lynch, contra.

**Middle District.*

Supreme Court of Pennsylvania.

SAMUEL SHEETZ *et al.* vs. AUGUSTUS W. HUBER *et al.*

Execution was issued upon a joint judgment against several co-defendants, one of whom was in the service of the United States as a soldier at the time. Upon application the court stayed the writ as to the soldier and a sale of the other defendants' interest was had, and the deed acknowledged. *Held,*

1. That the purchaser took a valid title.
 2. That the co-defendants, whose interests were sold, were not within the provisions of the act of 18th April, 1861, which exempted soldiers from civil process, and they can take no benefit or advantage from the provision.
 3. If an execution was forbidden and void as against one defendant it does not follow that it was illegally issued against a co-defendant: *Cadmus vs. Jackson*, 2 P. F. S. 295, distinguished.
 4. The principle that "process forbidden by law is void, and a sale under it conveys no title," has no application in this case.
- A writ of execution although irregular and erroneous is not necessarily a nullity. The validity of the judgment upon which such executions issued cannot be questioned in a collateral action, or other manner than by suing out a writ of error or by direct application to the court in which it is entered or from which execution issued, to vacate or set it aside.

Error to the Common Pleas of Lebanon County. Opinion delivered by

WILLIAMS, J.—If the plaintiffs' title to the land in controversy was divested by the sheriff's sale, under which the defendants
 [*Original Edition, p. 9.]

claim the ownership, they were not entitled to recover; and the court below was right in giving a binding direction to the jury to find for the defendants. The execution, on which the sale was made, followed the judgment. It was issued against all the defendants. The court refused to quash the writ, but ordered it to be stayed so far as regards John R. Breitenbach, "it appearing to the court that he is an officer in the United States army under a requisition of the government." Thereupon the sheriff sold the interests of the other defendants in the land levied on, and acknowledged and delivered a deed therefor to the purchaser.

If the execution was void the sale was a nullity. But if it was not void the sale divested the plaintiffs' title. Though the writ may have been erroneously issued, if it was not absolutely void, the error was cured by the acknowledgment of the deed, and the purchaser took a valid title under it.

There was nothing on the face of the record showing that the plaintiffs in the judgment had no right to issue the writ. It may be conceded that it was void as against John R. Breitenbach, because forbidden by the 4th section of the act of 18th April, 1861, P. L. 409, which declares that "no civil process shall issue or be enforced against any person mustered into *the service of this State or of the United States during the term for which he shall be engaged in such service, nor until thirty days after he shall be discharged therefrom."

But if it was void as to him, was it void as against his co-defendants? It was not forbidden as against them, either in express terms or by necessary implication. The act must have a reasonable construction; and in order to ascertain its meaning regard must be had to the purpose and intent of the legislature in its enactment. Manifestly it was intended for the relief and protection of persons mustered into the service of the State or of the United States for the purpose of aiding in suppressing the rebellion and restoring the Union—and it was not intended for the benefit of any other class of persons. Its sole object was to exempt them from civil process while engaged in such service and for thirty days after their discharge. It was intended to prevent their rights and property from being sacrificed while absent from home in the service of the government; but it was no purpose of the act to exempt their co-obligors or joint debtors from liability to process in the meantime. The exemption was intended as a personal privilege to the soldiers. Why then should the co-defendants of John R. Breitenbach take any benefit or advantage from the provision?

If the execution was forbidden as against him because he was in the military service of the government, what is that to them if it was not forbidden as against them? It is clear that they are not within the letter of the act, for they were not mustered into the service of the State or of the United States; nor are they within its spirit, for its sole purpose was the protection of the rights and property of the soldier.

If the execution was forbidden and void as against the one defendant, it does not follow that it was illegally issued and void as

[*Original Edition, p. 10.]

against the other. The rule that when the judgment is joint the process to enforce it must be also joint is technical, and has more of form than substance in it; and the court from which the process issues will take care that it be not used so as to work injustice: *Mortland vs. Himes*, 8 Barr, 265. If the judgment had been against John R. Breitenbach alone it would unquestionably have been the duty of the court to set aside or quash the execution, but if the court had simply stayed the writ none but the defendant could have complained or taken advantage of the error; and if the plaintiffs in the judgment had the right to sue out execution as against the other defendants the court was not bound to quash the writ as regards them, and no injustice was done to John R. Breitenbach by the order staying the execution as to him and refusing to quash it.

This case is clearly distinguishable from *Cadmus vs. Jackson*, 2 P. F. Smith, 295, upon which the plaintiffs in error rely. There the judgment was not joint but several, and the execution on which the land was sold issued after the defendant's death without any warning to his personal *representatives. It was held that the execution was void because forbidden by the 33d section of the act of 24th February, 1834, and consequently that the purchaser took no title under it.

The principle upon which the decision rests is this: Process forbidden by law is void and a sale under it conveys no title. But the principle has no application in this case. If the execution as against John R. Breitenbach was void because forbidden by the act of 1861, his interest in the land levied on was not sold, and, therefore, the question whether a sale under it would have divested his title does not arise. The question here is whether the execution as against the other defendants was void and the sale a nullity.

If the judgment in *Cadmus vs. Jackson* had been a joint judgment and the writ had been stayed as to the deceased defendant, can there be a doubt that the sale of the surviving defendant's interest in the land would have been good and that their title would have vested in the purchaser on the acknowledgment and delivery of the sheriff's deed?

Where there are several plaintiffs and defendants, and some of them die after final judgment and before execution, upon suggesting the death upon the roll, execution may be sued out by or against the survivors by name, or execution may be sued out by or against the survivors in the names of all, but it can be executed as against the survivors only: 2 Arch. Pr. 294-300; 2 Saund. 72 R.

If the plaintiffs in the judgment might have sued out execution against the other defendants upon suggesting the fact that John R. Breitenbach was an officer in the United States army, as doubtless they might, the execution was not void as to them. If erroneously issued against all the defendants, because one of them was exempt from process, the error was covered by the order staying the writ as to him and by the acknowledgment of the sheriff's deed; and the validity of the proceedings cannot be collaterally questioned in this action. The execution therefore was not void under the act of

[*Original Edition, p. 11.]

April 18, 1861, nor was it void under the prior act of April 2, 1822, if this act was not superseded and supplied by the act of 1861. There is nothing on the record showing that John R. Breitenbach was called into actual service as an officer or private of the militia under a requisition of the President of the United States or in pursuance of the orders of the governor of this commonwealth. On the contrary, the record shows that he was not an officer or private of the militia, but an officer of the United States army, and if so, he was not within the provisions of the act. But if he was within its provisions and entitled to the exemption from execution and other process for which it provides, it is clear that his co-defendants were not, and there is nothing in the act to prevent execution from issuing on the judgment as against them; and they cannot complain that the court *stayed the writ as against their co-defendant not liable to process if it might lawfully issue as against them. The execution then was not void under either act, and if it was voidable because forbidden as against one of the defendants, the plaintiffs in this action can take no advantage of the error. But it is contended that the execution was void because the defendants had obtained an order staying execution on the judgment under the act of May 21, 1861, P. L. 770, and the execution was issued before the expiration of the stay. But there is nothing on the face of the record showing that the defendants had obtained any such order. On the contrary, the record shows that the defendants had elected to retain the property levied on at the annual valuation fixed upon it by the inquest and that the plaintiffs were entitled to execution when the writ was issued in default of payment of the half-yearly instalment for more than thirty days after it fell due. It is true that in the case of *Waterman, Young & Co. vs. Breitenbach, Sheetz & Co.* the defendants applied for an order staying sundry executions issued against them, of which a list is given and to which is also appended a list of the judgments which were liens on their real estate, including the judgment upon which the land in question was sold; and upon the hearing of the application the court ordered and directed "that all the writs of *f. f.* issued out of the Common Pleas of Schuylkill County against the said defendants be stayed under the provision of act of assembly of May 21, 1861. . . . And also that execution do stay on the judgments." Whether the order was intended to embrace all the judgments which were liens on the defendants' real estate or only those upon which executions were issued, does not clearly appear. No notice of the application for stay was given to the plaintiffs in the judgment upon which the sale was made, and the defendants did not move the court to set aside the execution on the ground that the judgment was embraced in the order and the stay had not expired. If the order was intended to embrace the judgment, the plaintiffs should have had notice of the application, and the order should have been made part of the record, or some note or memorandum of it should have been entered on the docket.

In the absence of any such entry there was nothing on the record showing that the plaintiffs were not entitled to sue out execution.

[* *Original Edition*, p. 12.]

But if the order of stay was intended to embrace the judgment, the execution was not void.

If the writ issued before the stay expired it was erroneously issued and would have been set aside by the court on the defendant's application, but it does not follow that it was a nullity; the most that can be said against it is that it was irregular and erroneous, but if it was, its validity cannot be questioned in this action. Until set aside or reversed it must be regarded and treated as valid: *Stewart vs. Stocker*, 13 S. & R. 199; *s. c., 1 Watts, 135; *Lowber's Appeal*, 8 W. & S. 387; *Wilson vs. Howser*, 2 Jones, 107. There is then, as we have seen, nothing on the record showing that the execution was prematurely issued, and if it did appear that the defendants were entitled to a stay, the validity of the writ cannot be collaterally questioned in this action. As said by Kennedy, J., in *Lowber's Appeal*: "Where the objection extends no further than that the judgment upon which the execution has been issued has been erroneously entered or obtained, or the execution erroneously issued thereon, no other person than the defendant therein or his legal representatives will be permitted to make it. Nor will they be permitted to do so in a collateral action or other manner than by suing out a writ of error or by making a direct application to the court, in which the judgment is entered or from which the execution has been issued to vacate or set aside the same. This course is settled by a train of authority in this State which cannot be contested or resisted." As the execution was not a nullity, it follows that the court rightly instructed the jury that the plaintiffs are not entitled to recover, and consequently their verdict must be in favor of the defendants.

Judgment affirmed.

In re JOHN D. LENSENIG vs. HIRAM L. THOMPSON.

When a mortgage is prior to all other liens, except a fixed charge on the land not itself divested by the sale, its lien is preserved by the act of 1830, although there may be arrears of the prior charge due and unpaid, whether they accrued due before the date of the mortgage or subsequent to it, and that such arrears being a part of the fixed charge itself, are, therefore, not to be paid from the fund in court.

Appeal from the Court of Common Pleas of Lancaster County.
Opinion by

SHARSWOOD, J.—That the charge in favor of the widow of Tilghman Thompson was a fixed lien, not divested by the sheriff's sale on a junior incumbrance, is to be considered as now settled beyond any question. Indeed, it was not a matter in dispute either in the court below or here. It has been well settled, as a general rule, that a judicial sale will not discharge an incumbrance, whether created by the law or by the parties, when the charge stands in the title, and can be discharged only by the court undertaking to administer the fund by investing it in order to fulfil the purpose of it: *Devall's Appeal*, 8 Harris, 236; *Hiester vs. Greene*, 12 Wright, 96; *Strauss' Appeal*, 13 Wright, 353.

These cases did but generalize and apply the previous determinations in *Fisher vs. Kean*, 1 Watts, 259; *Bear vs. Whistler*, 7 Watts,

[* *Original Edition*, p. 13.]

144; *Reed vs. Reed*, 1 W. & S. 239; *Lauman's Appeal*, 8 Barr, 473. See *Schall's Appeal*, 4 Wright, 170. It has, however, undoubtedly been held that, though the charge itself may be a fixed lien, incapable of divestiture, because *incapable of computation, the rule is different as to any arrears, either of rent, annuity or interest which may be due at the time of the sheriff's sale; because such arrears are ascertainable with certainty in amount and therefore payable out of the fund: *Reed vs. Reed*, 1 W. & S. 235; *Mohler's Appeal*, 5 Barr, 418; *Kline vs. Bowman*, 7 Harris, 24; *Shertzer's Exr's vs. Herr*, Ibid. 34; *Lauman's Appeal*, 8 Barr, 473. It is to be remarked, however, that in no one of these cases was there any mortgage immediately following the fixed charge or lien, so that no question arose as to the effect of the act of April 6, 1830 (Pamph. L. 293). The intention of the act was to protect mortgages from divestiture, whenever there were no prior liens, which were themselves liable to be divested by a judicial sale, or, as it was expressed in *Helfrick vs. Weaver*, Phila., March, 1869, 26 Legal Intelligencer, 204: "Liens, the existence of which prior to a mortgage which cause it to be divested by a sheriff's sale, must be such as are themselves divested by the sale and thrown upon the fund." It is contended, then, that as, according to the authorities just cited, the arrears due Mrs. Thompson were payable out of the fund, they constituted a prior lien, which deprived the mortgage immediately following of the provisions of the act of 1830. It is manifest that if the arrears accrued due subsequent to the date of the mortgage, they ought not to have that effect: *Devine's Appeal*, 6 Casey, 348, and *Miners' Bank vs. Heilner*, 11 Wright, 452, are authorities in point as to this. If the law were not so, no mortgage would be safe. The act of 1830 would be a snare. It would depend upon the good will or the ability of the debtor in paying punctually his interest, whether the mortgage should remain or be divested by a sale. Very great uncertainty would thus be thrown around the vendee's title, a result to be most carefully guarded against. The same difficulty would exist if a distinction were to be drawn between arrears due at the date of the mortgage and those accruing subsequently. It may be said that it was the fault of the mortgagee to accept the security unless prior arrears have been discharged. Careful conveyancers will always see to this, not merely with reference to the question of first lien, but for other obvious reasons. We are not, however, to overlook the rights and interests of subsequent incumbrances and of the owner of the land. It is of great importance to them that the question whether a mortgage is to stand or fall by a sale, should be disembarrassed, as far as possible, of all questions of fact *in pais* outside of the record. The amount of arrears unpaid at the time of the sale can rarely affect the price beyond a few hundred dollars, and may be ascertained without difficulty and without much risk of loss if there should ever be a mistake. But the mortgage may be the whole or two-thirds of the value of the land, and upon the question whether it remains a lien or is discharged it depends whether anything or nothing is to be bid. This should be removed from the region of conjecture and *uncertainty by making it in all

[*Original Edition, pp. 14 and 15.]

cases as far as possible a mere question of law upon the records and the paper title.

It is true that in *Devine's Appeal*, 6 Casey, 348, there were not arrears due when the mortgages were executed. This fact is mentioned in the opinion, but it evidently was not the ground of the judgment. It was held in that case, that on a sheriff's sale subject to a mortgage and also to a prior ground-rent, the purchaser takes subject to the arrears of ground-rent due at the time of the sale. "While it is admitted," says Mr. Justice Strong, "that the ground-rent lien itself is not discharged, it is contended that the lien of the arrears is gone, and consequently that that of the subsequent mortgage is gone. The priority of the lien for arrears is determinable by the date of the ground-rent deed without regard to the time when they accrued. It is to that deed alone that the subsequent incumbrances or purchaser can look. It is unnecessary to refer to authorities for a doctrine so familiar. If a judgment be recovered for arrears, the lien on the land is still from the date of the deed. Unpaid arrears have no new lien created by matter *in pais* by the default of the tenant. They are the shadow of which the original ground-rent reservation is the substance, as much so as interest is of the principal." This course of reasoning applies with equal force to arrears due prior as well as subsequent to the date of the mortgage. The lien of these arrears did not spring into existence from time to time as they accrued due; otherwise there would be as many liens as there were days of payment. Interest, indeed, accrues *de die in diem*, and is always apportionable. They related to the date of the original charge and attached themselves to it as a mere incident, forming part of the charge itself. They might have been sued for and recovered separately, but the judgment would not have deprived them of the benefit of the original lien as was settled as long ago as *Bantleon vs. Smith*, 2 Binn. 146, and never departed from since. In *Miner's Bank vs. Heilner*, 11 Wright, 452, no distinction was drawn in the case, nor in the opinions between rent due before and after the date of the mortgage. But our brother Agnew in his concurring opinion says, "The lease being the subject of the mortgage is necessarily prior to the mortgage and the rent must therefore always be a prior lien . . . The legislature, therefore, could not have intended that the rent, which necessarily precedes a mortgage, should take away the security intended by this act to be given to leasehold mortgages." We conclude then that when a mortgage is prior to all other liens, except a fixed charge on the land not itself divested by the sale, its lien is preserved by the act of 1830, although there may be arrears of the prior charge due and unpaid, whether they accrued due before the date of the mortgage or subsequent to it, and that such arrears being a part of the fixed charge itself, are therefore not to be paid from the fund in court. The mortgage itself being thus ascertained to be a fixed lien, *the sheriff's sale is necessarily subject also, to all prior incumbrances: *The Northern Liberties vs. Swain*, 1 Harris, 113.

Decree affirmed and appeal dismissed at the cost of the appellants.

Eleventh Judicial District.
Court of Common Pleas, Luzerne County.

TYLER vs. ANTHONY.

1. There is nothing in the statute authorizing a justice of the peace to enter judgment by default against the defendant upon the mere statement of the amount and the examination of it. If the plaintiff does not appear before the justice in person, he must be represented by an agent or by witnesses.
2. *M'Cowan vs. Ward*, 1 Luz. Leg. Observer, 196, affirmed.

Certiorari. Opinion delivered by

CONYNGHAM, P. J.—The record returns that on the proper day of hearing the parties did not appear. There is nothing stated from which it can be reasonably inferred that the plaintiff was represented by an agent or by witnesses. The duty of the justice was then to enter a judgment of non-suit, and not upon the mere statement of the amount, and the examination of it, to enter judgment by default against the defendant. We refer to our opinion filed in the case of *M'Cowan vs. Ward*, 1 Luz. Legal Observer, 196, as substantially agreeing with this cause, and showing the grounds upon which we are compelled to reverse the judgment. The justice had no jurisdiction to allow the entry of such a judgment.

Proceedings reversed.

** Western District.*

Supreme Court of Pennsylvania.

PURMAN *et al.* vs. PORTER *et ux.*

Property acquired by a married woman on the credit of her separate estate, and afterwards paid for by profits arising out of it, is not liable for the debts of her husband.

Agnew C. J. dissents.

Error to Common Pleas of Greene County. Opinion delivered January 6, 1874, by

MERCUR, J.—Since the act of 11th of April, 1848, it has been settled by numerous decisions of this court, that the proceeds of the wife's separate property cannot be seized for the husband's debt. *Manderbach vs. Mock*, 5 Barr, 43; *Rush vs. Voight*, 5 P. F. Smith, 437; *Brown vs. Pendleton et al.*, 10 P. F. Smith, 419; *Meeser vs. Gardner*, 16 P. F. Smith, 242. If her property be real estate, the fact that her husband's labor assisted in creating the products derived therefrom, does not make them liable for his debt: *Rush vs. Voight*, *supra*.

Property purchased by a wife on the credit of her separate estate, or by her earnings, derived from the management of it, is protected from her husband's creditors: *Brown vs. Pendleton et al.*, *supra*. The jury has found that the property in question was acquired by Mrs. Porter upon the credit of her separate estate, and that it was afterward paid for out of the proceeds which derived from Cosgrave's

[* *Original Edition*, p. 17.]

occupancy of the same. The first and fourth assignments are not sustained. Under the evidence the court was correct in refusing to affirm the point covered by the second assignment. There was no testimony that Mrs. Porter acquired the property otherwise than as her share of the profits under her agreement with Cosgrave. It is error to submit a question of fact to the jury of which there is no evidence: *Sartwell vs. Wilcox*, 8 Harris, 117; *Torver et al. vs. Clement*, 1 Casey, 63.

The manner in which the point, covered by the third assignment, was presented, is so unusual, we at first supposed the word "disbelieve" had been inadvertently used for "believe," and that the court must have so understood it. An examination of the original written point, however, as well as the fact that in the fifth point presented by the defendant below the language is changed to "believe," leaving the point otherwise the same, satisfied us it was designed as written. The plaintiff below could not recover without evidence. Evidence is such proof of the fact alleged, as satisfies the mind. If all the testimony given in support of the allegation is disbelieved, it necessarily follows that the mind would be *unsatisfied, the evidence would be insufficient, and the plaintiff could not recover. As the credibility of witnesses is a proper question for the jury to pass upon, and the point submitted clearly raised that question it should have been affirmed. The affirmance, however, should have been accompanied by proper explanations and instructions, as to weighing the testimony and testing the credibility of witnesses. The third assignment is therefore sustained.

Judgment reversed, and *venire facias de novo* awarded.

AGNEW, C. J., dissenting.—The decision in the court below was a step in advance of any heretofore made, and tends to the dissolution of the marital relation and rights of the husband. The property levied and sold in execution against Porter, the husband, was paid for by Cosgrave, a partner in the business of Mrs. Porter, out of the proceeds of the business. By the agreement between Cosgrave and Mrs. Porter, she found the bar-room and a stable, and Cosgrave was to give his services in lieu of the rent of the bar-room, and his own stable as an equivalent for the rent of hers. Both of them were to furnish equally the capital to purchase liquors, etc., for the bar, and oats, hay, corn, etc. for the stables. It was from the profits of the business of the bar and stables, the furniture in question was purchased and paid for through Cosgrave. Porter and wife lived together, the marital relation having been neither broken nor impaired by the desertion of Porter, or by his refusal to maintain her, or other cause. She was, therefore, not a *feme sole* trader, either under the act of 1718 or the act of 1855. These acts underwent careful scrutiny in *Cleaver and Wife vs. Scheetz and Wife*, decided at Philadelphia in 1872, 29 Legal Intelligencer, 196, June 21, 1872, and the condition of a *feme sole* trader was therein stated.

It is clear, by numerous decisions, that a wife, living with and supported by her husband, acquires no property in the fruits of a

[*Original Edition, p. 18.]

business carried on by her on credit, or through her own labor, when not founded upon her own capital or separate property. The property thus acquired is her husband's, and is liable to his creditors.

The position here that the fruits of the partnership with Cosgrave were her individual property is incorrect. It is true the rent of the bar-room was paid for by Cosgrave's services, and the rent of the stable was rendered in an equivalent use of Cosgrave's stable for the partnership purposes. But these were not the fruits which entered into the purchase of the furniture. Now this was not the product of her individual estate, but of the added capital, which was not shown to be her own. In the absence of clear proof, it is presumed the means were furnished by her husband, and no presumption arises from desertion, for they lived together, he giving his assistance. It is unlike the case, *Rush vs. Voight*, where the *products of the wife's farm were held to be hers. To make the most of the evidence in her behalf, arising from the rent of the bar-room and stable, it is a case of confusion of her rent with the fruits of the partnership business founded on the husband's capital, and his right to her labor and services. But the well settled rule is that a wife can establish her right to individual property against the husband's creditors, only by clear and satisfactory evidence that it was obtained by or through her own exclusive means.

Supreme Court of Pennsylvania.

(*At Nisi Prius.*)

JOHN RICE, *Trustee*, vs. SOUTHERN PENNSYLVANIA IRON AND RAILROAD COMPANY.

1. A master cannot go behind the decree of foreclosure in distributing a fund raised by the sale. He must distribute it to the parties entitled under the decree.
2. Where there is no residue after the bondholders and lien creditors are satisfied, stockholders have no interests that need consideration.
3. The master should consider and settle the titles of adverse claimants to bonds.
4. A mortgage made to secure the payment of certain bonds is made for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder.
5. Creditors cannot inquire into the good faith of a transaction by the company, unless it covers a fraud intended to affect them.
6. An auditor has no power to open or set aside a judgment. To him it is conclusive, and if creditors would attack it they must resort to the proper court for that purpose.
7. Where bonds are pledged as collateral the holders have a right to receive the full amount of the bonds, and not only the face of their claims with interest, unless subsequent creditors can show a resulting interest in their debtor. The holders must be left to account to their principal for any balance that may be over the amount due to themselves.
8. A bond of this character, though not a technically negotiable paper, is practically so for all purposes of commerce. They pass by delivery, and may be sued by the holder in his own name. The burden of proof, therefore, is upon the party who alleges that they were not received in the ordinary course of trade, and for a valuable consideration.
9. An act of an officer of a corporation, afterwards ratified by the board of directors, becomes, by such ratification, the authorized act of the corporation.

Exceptions to master's report distributing fund raised upon a sale of the property of the corporation defendant under the foreclosure

of a second mortgage. The Southern Pennsylvania Iron and Railroad Company, having purchased certain bonds from Daniel V. Ahl, paid thereon, \$50,000 in cash and \$50,000 in first mortgage bonds, and further agreed to give him 80 of 200 second mortgage bonds for \$1,000 each, to be thereafter made and executed.

After the second mortgage bonds were executed 80 of them were respectively tendered to Ahl, and he persistently refused to accept them, because *two judgments for \$33,000 each, which were prior liens, had been confessed by the company.

The 80 bonds refused by Ahl, together with other second mortgage bonds, were afterwards issued and delivered to Richmond L. Jones, as collateral security to protect him and others for money loaned to the company. Large amounts of the money so loaned were obtained by the individual endorsements of Jones and others, and the said bonds were put up as collateral by Jones with the parties from whom the money was borrowed. The face of the bonds, which was made good by the amount realized at the sale under the foreclosure of the mortgage, was in excess of the debts for which they had been pledged by Jones, though less than the indebtedness of the company to him.

These bonds were presented to the master for payment by the parties with whom Jones had pledged them as collateral, who claimed payment in full to them.

Daniel V. Ahl, although he had no bonds, claimed the right to receive the amount of the fund belonging to eighty of those bonds, notwithstanding his refusal to take them upon the ground that the company had covenanted to issue them to him under the agreement above referred to.

John Rice held a judgment against said company for \$125,000, the lien of which was subsequent to the second mortgage.

Opinion delivered December 26, 1873, by

GORDON, J.—Adopting the principle developed in the case of *McElrath vs. The Pittsburgh and Steubenville R. R. Co.*, 18 Smith, 37, that the master, in the case like the present, cannot go behind the decree of foreclosure to ascertain the *bona fides* of the parties to the mortgage, but is limited to a distribution of the fund raised by the sale, we cut off many of the exceptions to the master's report, and also much of the testimony as irrelevant.

Thus, it matters not in the present inquiry, that Jones' contract for the construction of the road should have been \$400,000 instead of \$600,000, that the stock subscriptions were gotten on false representations, or that Mr. Ahl was to get too much or too little for his land; or that through misrepresentation he was induced to exchange a good security for one that was worthless. None of these things, nor the intention of the directors in executing this mortgage, can now be inquired into; the day for this has gone by. What remains for us to do is simply and only to distribute the fund among those to whom of right it belongs. As there will be no residue after the bondholders and lien creditors are satisfied, it is clear that the stockholders have no interest that need consideration.

[*Original Edition, p. 20.]

*Undoubtedly the master should consider and settle the titles of adverse claimants to the bonds. Hence we may first consider the exceptions of Daniel V. Ahl, who alleges that the master erred in not awarding to him the proceeds of some 80 of these bonds, or rather the sum of \$80,000 produced by the sale under the mortgage. If we understand the general idea contained in his exceptions, it is that the second mortgage was made chiefly for the purpose of securing to him the balance of the purchase-money resulting from his sale of lands to the company, and that therefore he had a vested right in the mortgage from the date of its execution, that the tender of the bonds was only a recognition of his pre-existing right, and that his refusal to accept them did not either extinguish or weaken that right. But we hold this position to be untenable in this, that the mortgage was executed not to secure his purchase-money, but to secure 200 bonds of \$1,000 each. How could the agreement of the company to give him 80 of these bonds create a specific lien in his favor in the mortgage itself? Suppose the bonds had never been tendered to him, that the company in violation of their agreement had refused to deliver them to him, could he nevertheless have recovered his \$80,000 through a *scire facias* on the mortgage? We think not. It does seem to us that in such case the remedy must lie either in covenant upon the agreement, or in a bill to rescind that agreement and restore him to his rights under his former contract. We are at a loss to discern, as alleged by his very eminent counsel, how his case is bettered by his steadfast and persistent refusal to accept of these bonds. It looks to us that this was a fatal mistake that is now past remedy. It is no doubt true that the company acted in bad faith, in permitting the judgments Nos. 203 and 204, August term of the Common Pleas of Franklin County, to precede the execution of the mortgage, but neither does this help Ahl's status with reference to that mortgage.

It is then to us clear that the master was right in refusing to let him in upon this fund.

We turn next to the exceptions of John Rice. He complains of the master's ruling in that he allowed the full face of the claims of Augustus F. Boas and the Farmers' National Bank of Reading (the two judgments already referred to), because these claims were in part made up of usurious interest; in other words, that these judgments were purchased by the claimants at a usurious discount from one A. L. Boyer, a broker of Reading, to whom they had been executed by the company for the purpose of discount. Now whether these were *bona fide* purchases from Boyer, or were taken with the knowledge that they were confessed to him without consideration, and for the mere purpose of sale, matters not. Creditors cannot inquire into the good faith of the transaction, unless it covers a fraud intended to affect them. On this the authorities cited by the master are *full and to the point. It is also settled that an auditor has no power to open or set aside a judgment. To him it is conclusive, and if creditors would attack it they must resort to the proper court for that purpose.

The next exception by Mr. Rice presents the complaint that the

[*Original Edition, pp. 21 and 22.]

master should only have allowed to the Reading Saving Bank, Bushong & Bros., and the Kensington National Bank, the face of their claims with interest, and not the full amount of the bonds which they hold only as collateral security. No doubt this would be so were these collaterals held directly from this iron and railroad company, or from Jones as their agent. But as the master has found, and we think rightly from an examination of the testimony, that these bonds were issued to Jones for his own security, as well as that of others in raising money for the purposes of this company, and that he will not be paid by the bonds which he received and deposited with these parties, we cannot under such circumstances regard the equity of subsequent creditors as superior to that of Jones, and must therefore leave these bondholders to account to their principal for any balance that may be over the amount due to themselves. With reference to the bonds held by the Allegheny National Bank no such circumstances have appeared as would throw upon them the burden of proof of showing that they received them in the ordinary course of trade, and for a valuable consideration. These bonds are made payable to bearer, they pass by delivery, and may be sued by the holder in his own name, so that, though not technically negotiable paper, they are practically so for all purposes of commerce.

We cannot therefore, upon the mere motion of a disappointed creditor, compel the holder of such bonds to prove that they were obtained from the company for a valuable consideration.

Next come the three bonds held by Henry M. Keim. It is not denied that the company received full consideration for these in the way of his service as secretary. But it is alleged that the treasurer had no authority from the board of directors to issue them. We might answer this exception by directing attention to the fact, that the company has found no fault with that act, and it behooves not a stranger to call it in question; nevertheless, whether the acts of the treasurer in the matter were authorized or not, at or before the time they were transacted, they were acquiesced in by the directors, and thus ratified: *Kelsey vs. Bank*, 19 P. F. Smith, 429.

We deem it unnecessary to dwell upon the remaining exceptions, as they are substantially disposed of in what has already been said. In conclusion we think the master has properly disposed of the fund in controversy. Report confirmed; decree to be entered accordingly.

Hon. *F. Carroll Brewster* and *Samuel G. Thompson, Esq.*, for John Rice, trustee.

Charles Henry Jones and *George W. Biddle, Esqs.*, for *the railroad and Richmond L. Jones.

George F. Baer, Esq., for the Reading creditors.

Wm. McLellan, Wm. S. Stenger, David W. Sellers and *Jeremiah S. Black, Esqs.*, for Daniel V. Ahl.

Alexander K. McClure and *James Thompson, Esqs.*, for John Rice, creditor.

Alexander D. Campbell, Esq., for Kensington National Bank.

Charles Henry Jones, Esq., for Allegheny National Bank.

[*Original Edition, p. 23.]

*Twenty-third Judicial District.***Court of Common Pleas, Berks County.****DRUMHELLER vs. KEIM.**

Persons liable to do military duty under the act of May 4, 1864, were subject to the *per capita* tax authorized by the act of February 17, 1865.

Opinion by

WOODWARD, P. J.—These suits were brought to recover from these defendants respectively the *per capita* tax assessed against them by the school directors of the township of Pike, under the provisions of the act of assembly of the 17th day of February, A. D. 1865. By the second section of this act, it was made lawful for the school directors, or supervisors of the several boroughs and townships of the county of Berks, to levy and collect a tax not exceeding twenty-five dollars "on each male inhabitant, who is liable to do military duty." The ground of defence in the case of John Keim, is that before the draft of February, 1865, he had furnished a substitute and was thereby exempt from the military service of the United States at the time when this tax was assessed. George M. Keim had been drafted in 1864, and had paid the commutation of three hundred dollars, which he claims exempted him from military duty for three years. If the act of 1865 had provided for the relief of all persons, who at the date of the levy of a *per capita* tax, were free from liability to the demands of the military authorities of the United States, the ground of defence assumed by John Keim would be sustainable. It is not apparent, however, that such a provision would have helped the case of George M. Keim. By the express terms of the 13th section of the act of congress of the 3d of March, 1863, the payment of commutation money, only secured the exemption of the persons paying, from "further liability under that draft." But as to the defence asserted by John Keim, it is necessary to look for the meaning of the words used in the second section of the act of 1865, in their connection, not with the acts of congress, nor with the action of the federal government, but with the provisions of the acts of assembly of Pennsylvania. Who, then, were persons "liable to do military duty" within the purview of the "act of 1865"? Manifestly all those whom in any emergency the commonwealth, in the exercise of her sovereignty, could call into the field as composing the military force. The legislature were dealing with a class of persons defined by their own statutes and not with the exceptional cases of those who were temporarily affected by the provisions of the act of congress which regulated the conscription.

The meaning of the language of the act of 1865 is fixed by the language of the general militia act of the fourth of May, 1864. By the first section of the last named statute, it was provided that every able-bodied white male citizen, resident within the State, of the age of twenty-one years, and under the age of forty-five years,

[*Original Edition, p. 24.]

excepting persons enlisted into volunteer companies, persons exempted by the following sections, idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime, should be enrolled in the militia. The third clause of the second section authorized an application for exemption on account of physical defect or bodily infirmity, or by virtue of any law of this State or the United States. The ninth section defined the persons to be exempted under the laws of the United States to be those "absolutely exempted from enrolment in the militia."

Turning to the act of congress of the 8th of May, 1792, it is found that the persons freed from militia duty are the vice-president, the executive, legislative and judicial officers of the federal government, the officers of the custom house and post office services; post officers and stage drivers carrying the mails; ferrymen on post roads; inspectors of exports; all pilots and all mariners actually in sea service. It is not pretended that any act of congress which authorized the acceptance of a substitute in lieu of personal service in the United States army for three years, was designed in any way to affect the right of the State to regulate its militia roll. The last two clauses of the 9th section of the militia act, directed the exemption of the public officers of the State and of the several counties, and of the members of uniformed companies. Both these defendants "were liable to do military duty" under the act of 1864, upon any requisition of the State authorities, and being so liable, they were expressly subject to the tax authorized by the act of the 17th of February, 1865.

Judgment in each case is entered for the plaintiff.

**Second Judicial District.*

Court of Common Pleas, Lancaster County.

J. MILLER RAUB vs. J. S. EAKIN, Defendant, and CHRISTIAN WALTER, Garnishee.

1. Where the testimony produced in the depositions taken in a proceeding to dissolve a foreign attachment, appears to establish the fact that the defendant was a resident of this commonwealth at the time the attachment issued, the attachment will be dissolved.
2. No order for the allowance of a counsel fee and costs to a garnishee will be made, where the record shows no appearance of counsel, no interrogatories filed, nor answers prepared on the part of the garnishee.

Foreign attachment. Rule to show cause of action, and why the attachment should not be dissolved and a reasonable counsel fee allowed garnishee, etc. Opinion delivered *January 17, 1874*, by

LIVINGSTON, P. J.—The act of assembly, under which writs of foreign attachment are issued in Pennsylvania, declares "that writs of foreign attachment may be issued against the real or personal estate of any person not residing within this commonwealth, and not being within the county in which such writ shall issue, at the time of the issuing thereof."

Foreign attachment, therefore, is a remedy against debtors that are absent and non-resident in the commonwealth, in and by which

[*Original Edition, p. 25.]

the non-resident debtor is treated as having merely broken his contract, and his goods are attached to enforce his appearance. In order, therefore, to warrant the issuing of a writ of foreign attachment, the debtor must be a non-resident at the time it issues.

Residence is the act, the state, or the habit of dwelling, or abiding in a place; the act, or state of being a resident—habituary or inhabituary. It is a question made up of fact and intention. Residence (says Burrill) imports not only a personal presence in a place, but an attachment to it, by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there, etc.

A resident, therefore, is a person coming into a place with intention to establish his domicile or permanent residence there, and in consequence actually remains there. Time is not so essential as the intent executed. There is no absolute rule as to the time required to acquire a residence that is to be governed by the peculiar circumstances surrounding each case, and the Supreme Court has, on several occasions, decided that twelve months was sufficient.

The main question, therefore, in the case before us is, was J. S. Eakin, the defendant, at the time of issuing this writ of foreign attachment, a resident of this commonwealth or a non-resident? If a resident, the rule must be made absolute and the attachment dissolved. If a non-resident, the rule must be discharged and the attachment allowed to remain in force.

*Considerable testimony has been taken and presented on the argument of the rule by the learned counsel for plaintiff, with great force, most of which seems to have been expressly intended to inform the court that the defendant is a gambler and a humbug, and that he accompanied the circus owned by plaintiff, and under a lease from him, exhibited a snake, parrot, kangaroo, a giantess, who was not just exactly as high as he represented her, a Circassian woman and some mice, and played "three card monte," which one of the learned witnesses informs us, and we have no doubt he speaks from sad experience, is a game of chance, in which the party betting has no chance of winning. Not a particle of this testimony has anything to do with the case before the court, except to show that, so far as character and respectability are concerned, these parties stand, by the plaintiff's own showing, about upon an equality, and to satisfy us that we need not search for saints among the proprietors of a circus, or the side show accompanying it, by virtue of a lease from the proprietor, who undertakes to advertise it for the lessee. The only testimony produced by plaintiff, relevant to, or bearing upon the issue, is the declaration of defendant himself, made to several attachés of the circus while travelling with them during their travelling season. O. P. Hart states that defendant told him that his permanent residence was in Western Virginia, that he owned real estate there, and his mother, a widow, resides upon it, and that he had received letters from Eakin, in which he wrote "I am at home, in Virginia." Hiram T. Day states that defendant told him that his permanent residence was in Virginia, that he owned real estate there, and his mother was living

[*Original Edition, p. 26.]

upon it. Thomas Stewart states that he became acquainted with defendant in Pennsylvania, but knows nothing about his permanent residence. Benjamin Reese states that he met defendant at Tewanda, Pa.; that defendant a few weeks since was in Baltimore, and last summer told him his residence was in Virginia, and Andrew Leibly states that he became acquainted with defendant in Pennsylvania, in July last, and that he travelled through Maryland, Virginia, New York, and Pennsylvania with the circus, and told him his parents lived in Virginia, and that was his home. These are all declarations of defendant, none of which were made under the sanction of an oath. While on the part of the defendant, we have his own testimony, taken under rule of court, on oath and cross-examined by plaintiff, in which he states that he is twenty-four years of age, a showman by profession, having been engaged in that business about four years. That he resides permanently in Philadelphia, Pennsylvania. That his business compels him to travel a great deal, and he is sometimes out of Pennsylvania, where he resides. That he has been in the habit of spending his winters in Philadelphia, and claims that city as his permanent residence. He is a single man, was born in West Virginia, where his parents still reside. He owns no real estate in either State, and although entitled to vote in Pennsylvania, has never voted. That he went *to Baltimore, Md., about six weeks before he testified, and intended to return to Philadelphia about the last of December, and that he spent his winters in Philadelphia, because that is his home. He also produces another witness, J. H. Joseph, who testifies that he has known Eakin for four years, and from his own knowledge, knows his residence has been in Philadelphia, Pa., during all that time, and that Philadelphia is his permanent home.

The testimony produced, therefore, appears to us to establish the fact that Eakin, the defendant, was a resident of this commonwealth, and not a non-resident when the attachment issued, and therefore, the rule must be made absolute, and the attachment dissolved.

We are also asked to direct a reasonable counsel fee and costs for garnishee; but as these proceedings have been on the part of the defendant, and not the garnishee, and the record shows no appearance of counsel for garnishee, no interrogatories filed, nor answers prepared on his part, we decline making such order for counsel fee. The payment of the costs in the foreign attachment, is of course thrown upon plaintiff, by dissolving the attachment.

Rule made absolute and attachment dissolved.

J. L. Steinmetz, Esq., for plaintiff.

T. J. Davis, Esq., for defendant and garnishee.

[* *Original Edition, p. 27.*]

*Twenty-fifth Judicial District.***Court of Quarter Sessions, Clearfield County.****In re JURISDICTION OF ASSOCIATE JUDGES.**

1. In construing the constitution, a comprehensive view of the whole instrument must be taken. Every part of it must be considered, and all its parts made to harmonize if practicable.
2. The ninth section of the judiciary article of the new constitution, construed in connection with the fifth section of the same article, and the sixteenth and twenty-sixth sections of the schedule, does not presently constitute the judges learned in the law sole judges of the Courts of Oyer and Terminer, Quarter Sessions, and Orphans' Courts.
3. Associate judges in commission on the first day of January, 1874, continue to hold their respective offices, and it is their right and duty to serve in all the courts as *heretofore*, until the expiration of the terms for which they were elected and commissioned.

Opinion delivered *January 13, 1874*, by

ELWELL, P. J.—The associate judges of this county being desirous to conform to the provisions of the new constitution, and having heard doubts expressed as to whether, under it, they have jurisdiction as judges of the Oyer and Terminer, Quarter Sessions, and Orphans' Courts, have requested my opinion on the subject. The question thus informally presented, relating as it does to the organization of the court, and consequently to the legality of its proceedings, is of the first importance. In view of this fact, and of the necessity for an early decision, I have given to the subject such consideration as time would allow, and now state my conclusion, and briefly some of the reasons which have led to it.

Under the constitution of 1838, and the amendment of 1850, associate* judges of the Common Pleas were, by virtue of their office, judges of the courts above mentioned. They were elected by the people, and commissioned by the governor for five years. The commission did not designate the courts of which an associate was judge. It recited the fact of the election, and commissioned him to be an "associate judge of the county—to have and to hold the said office, together with all the rights, powers and emoluments thereto belonging, or in anywise appertaining." An office consists in a right and correspondent duty to execute a public trust, and to take the emoluments belonging to it. (3 Kent's Com, 560; 7 Bac. Abr. 279.) In *Commonwealth vs. Gamble*, 12 P. F. Smith, 348, Thompson, C. J., declares that the powers and jurisdiction contained in a commission authorized by the constitution, constitute the office; that they are the essence of it, and are to be exercised during the whole term therein mentioned. The principle to be deduced from these authorities is, that when a judge was commissioned, under the old constitution, he became *ipso facto* a judge of all the courts named. His powers and jurisdiction in each and all of them, constituted the office in which he was authorized to serve.

The office of associate judge is not abolished by the constitution of 1874, except in counties which form separate judicial districts, and in these it is expressly provided that the judges shall serve for

[* *Original Edition*, p. 28.]

their unexpired terms. By abolishing the office specially in the separate districts, it is clearly implied that it should continue as to districts composed of more than one county. But we are not left to ascertain the intention by construction in this instance, for in the sixteenth section of the schedule it is provided that "associate judges not learned in the law, elected after the adoption of this constitution, shall be commissioned to hold their offices for the term of five years from the first day of January next after their election."

In *Commonwealth vs. Clark*, 7 W. & S. 133, Chief-Justice Gibson defined a schedule to a constitution to be "a temporary provision for the preparatory machinery to put the constitution in motion without disorder or collision. Its use is merely to shift the machine gradually into another track, and having done its office it was to be stored away in the lumber room of the government." And this is undoubtedly the general rule, but cannot be applicable to a section in a schedule like that of the sixteenth, which makes a perpetual provision in regard to a judicial office.

What we have to do with now, however, relates to the powers of judges in office on the first day of January, 1874, when the new constitution went into operation. By consulting the schedule again we find that no sudden and violent action, no disorder or collision was intended. The twenty-sixth section declares that "all persons in office in this commonwealth at the time of the adoption of this constitution, and at the first election under it, shall hold their respective offices until the time for which they were elected or appointed shall expire, and until their successors shall be duly qualified, unless otherwise provided by this constitution. In regard to associate judges it is not otherwise provided for, and therefore *they are not excepted from the general saving clause of the section. But it is supposed that the authority of the associates is entirely abrogated by section ninth, article fifth, of the constitution. It is by that provided that "judges of the Court of Common Pleas, learned in the law, shall be judges of the Courts of Oyer and Terminer, Quarter Sessions of the Peace and of the Orphans' Courts;" and if we were to consider this provision by itself, the conclusion would be irresistible that judges other than those learned in the law were to be excluded from these courts. But in construing a constitution a comprehensive view of the whole instrument must be taken. Every part is to be considered, and all its parts made to harmonize, if practicable, so as to give a sensible and intelligent effect to each. It is not to be presumed that the framers of a constitution intended that any part of it should be without meaning. (Potter's *Dwarris on Statutes and Constitutions*, 144, 655.)

In order to ascertain whether this ninth section at once and perpetually debars associate judges from all jurisdiction except in the Common Pleas we turn to the fifth section of the same article five and there find that although the office is abolished in counties of more than fifty thousand inhabitants, constituting separate districts, yet, as to them, it is expressly provided that "the several associate judges in office when this constitution is adopted shall serve for

[*Original Edition, p. 29.]

their unexpired term." Serve in what courts? In the Common Pleas only or as heretofore?

Understood according to its common acceptation, this term "serve" means nothing less than no interruption is intended, but that the powers and jurisdictions heretofore exercised shall continue to be exercised without diminution. This is the meaning which the minds of the people naturally ascribe to it. Courts of justice, in order to arrive at the true intent, must ascribe to the words used in a constitution the meaning of words, which is generally understood as being their meaning.

"Constitutions," says Judge Story, "are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness, or judicial researches. They are instruments of a practical nature, founded on the common business of life, adapted to common wants, designed for common use and fitted for common understandings. The people make them; the people must be supposed to read them with the help of common sense and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." (Story's Com't., Sec. 451.)

If to serve out their terms of office means, as I have no doubt it does, that the associates in the counties forming separate districts shall continue to perform all the functions and to exercise the same power and jurisdiction as heretofore, then the ninth section cannot go into operation in such districts until the associates have served out their terms. Thus construed sections five and nine harmonize, and the intended force and effect is given to each.

*The necessity for associate judges is much greater in counties where the president judge does not than where he does reside. Much of the business in the Quarter Sessions and Orphans' Court, such as road and bridge views, appointments of township and other officers, taking bail and the like, and in the Orphans' Court appointing guardians for minors, approving sureties in recognizances, and many other matters require a local knowledge which a non-resident judge cannot have. It is not reasonable to believe that the convention intended by the ninth section to take from the office of associate judge the power most needed and useful, and yet to continue the office, or to conclude that there existed an intention to abridge the power and authority of those in districts composed of several counties, where they are most needed, to an extent to render the office of little practical value and at the same time to allow them in the separate districts where their services are really not much needed, to continue to serve for the time being in all the courts, and to the full extent of their previous power.

In considering the several sections referred to, together with the schedule, I have no difficulty in arriving at the conclusion that, for the time being, the office of associate judge is not and was not intended to be affected by the constitution. Its continuation as an office, which, as we have seen, consists of the powers and jurisdiction granted, was provided for by the twenty-sixth section of the

schedule, embracing all the right and power incident under the old constitution, at least until the present term expires.

Whether after that time the judges learned in the law are to be the sole judges of these courts is not now a question before us; before it can arise there will be ample time to give to it full consideration.

What is now decided is this, and this only, that the associate judges of Clearfield county, now in commission, have not only the right, but there rests upon them a corresponding duty, to act as judges in the several courts of the county and to perform all the functions of their office as heretofore.

First Judicial District.
District Court of Philadelphia.

In re ORWIG.

1. Gross misconduct on the part of an attorney acting in his official capacity is a sufficient cause for striking him from the roll, although the person whom he injures be not a client.
2. Good faith, more than skill or intellect, is essential to the profession of the law.

Rule to show cause why Samuel H. Orwig should not be stricken from the role of attorneys. Opinion delivered *January 10, 1874*, by

HARE, P. J.—This is a rule granted at the instance of Morris Stroud to show cause why Samuel H. Orwig should not be stricken from the roll of attorneys in this court. The testimony is long and complicated, *embracing a period of several years. Without entering into a minute detail of the facts it is enough to say that the respondent, Orwig, was the attorney at law and in fact of Leonard Benkert to collect a second mortgage of \$22,100. The premises were sold by the sheriff and the petitioner, Stroud, became interested in the completion of the sale and in having the title made to him as the purchaser. He gave Orwig a fee of \$300, and soon afterwards a note for \$2,900, which was discounted and the proceeds paid to Orwig, who signed the following receipt:

Received, Philadelphia, July 1, 1871, of Morris R. Stroud, three thousand dollars, on account of purchase of Seventh Street Opera House, and agree to take a mortgage in favor of Mr. Leonard Benkert, at two years, for sixteen thousand dollars, the balance of purchase money.

Signed, SAMUEL H. ORWIG,
\$3,000. *Attorney in fact for Leonard Benkert.*

The sale fell through in consequence of Orwig's wilful failure to produce a set of searches which were in his keeping as attorney for the mortgagee. It then became his duty to repay the proceeds of the note, or if he had any doubt on this point to hand the money over to Benkert, and leave him to adjust the question of right with Stroud. Instead of taking either course he kept the money, and, as we must infer from the evidence and his silence, used it for his own purposes. His conduct in this regard is entirely without excuse, because Benkert, who had been in Europe, returned and made re-

[* *Original Edition*, p. 31.]

peated demands for the money, personally and in concert with Stroud, which were all evaded or refused. Orwig did not then deny his liability, and on the contrary offered to give Stroud a mortgage for \$3,200, in liquidation of the debt, which was declined.

Orwig also obtained \$625 from the owner of the mortgaged premises as a contribution to the sum of \$1,250, which was to be paid by Benkert to avert a sale under the first mortgage, but withheld the money; and Benkert's nephew, who was acting for his uncle, was obliged to raise the whole amount from other sources.

After the lapse of two years Benkert and Stroud applied to this court for redress, and an order was made that Orwig should pay Benkert the sum of \$625, which he had received from the terre tenant, and also the \$2,900, due to Stroud, with interest from August 7, 1871; it being agreed between Stroud and Benkert, that the latter amount should be handed over forthwith to Stroud. Orwig did nothing towards complying with this order until September, 1873, when he gave Benkert \$3,525, and Benkert immediately returned \$1,900 to Orwig with the understanding that Orwig should appear and act for him in any suit that might be brought by Stroud to recover his proportion of the fund.

It results from this brief summary of the evidence, that Orwig did a manifest wrong to Stroud, and was also guilty of a gross breach of the professional obligation which he owed to Benkert. But it is contended on his behalf that he was not Stroud's attorney, and that as Benkert was *content to take a part payment in satisfaction our jurisdiction is at an end, and we cannot punish the offence which he condoned. The premise on which this argument rests seems to be unfounded, and would not justify the conclusion if true. When interrogated under oath Orwig refused to admit that he had received a fee from Stroud, and persisted in his denial until confuted by the production of Stroud's check with his endorsement. It appears from Casselberry's deposition that the check was given to him on the faith of his undertaking "to get the title through;" and, although he now alleges that he was only retained to oppose the rule to set aside the sheriff's sale, we cannot regard his memory as trustworthy. The inquiry is not essential to the determination of the matter in hand. Gross misconduct on the part of an attorney acting in his official capacity is a sufficient cause for striking him from the roll, although the person whom he injures be not a client. That such an offence was committed in this instance is clear to every member of the court. It is not the case of one who, having collected money in good faith, uses it for some pressing need, in the delusive hope of being able to make the default good in a few days or weeks. What the evidence discloses is a deliberate design conceived and executed with the art of an adept in intrigue. We are compelled to believe that the respondent obtained the note and had it discounted, not for the purpose of employing the money in the way contemplated by Stroud, or of handing it over to Benkert, but with the design of converting it to his own use to the entire frustration of the just expectations of both.

If we leave Stroud out of view, and consider the respondent's

[*Original Edition, p. 32.]

conduct solely in the aspect of his relation to Benkert, we shall be led to the same result. It is immaterial that Benkert settled the case and withdrew the accusation which he had made. In bringing such a charge against an attorney and substantiating it by evidence he imposed an obligation on the court which no change of purpose on his part could impair. The bar and the community became parties in interest, and entitled to require that justice should have its course. The question is not one of *meum* and *tuum*; whether Stroud or Benkert shall have a few dollars more or less; it is, have we judicial knowledge that Samuel Orwig is wanting in good faith; which more than skill or intellect is essential to the profession of the law. As the eloquence and learning of the lawyer are the sword and buckler of his client, so his honesty should be the staff. There can be no more melancholy spectacle than that which this case presents, of an attorney using a perverted ingenuity to entangle the interests confided to his care. It would be a neglect of duty not to visit such an offence as it deserves. The court directs that the rule be made absolute, and that a certified copy of the rule be sent to the Court of Common Pleas, in view of the near future in which all the city courts will form co-ordinate branches of the same tribunal.

George L. Crawford, Esq., for Morris R. Stroud.

Thos. A. Gummey and David W. Sellers, Esqs., for Orwig.

**Twenty-sixth Judicial District.*

Court of Common Pleas, Columbia County.

CONYNGHAM SCHOOL DISTRICT vs. THE COUNTY OF COLUMBIA.

1. School districts are entitled, under the act of 8th May, 1854, to the full amount of all taxes collected on unseated lands, returned by the collectors of the school tax to the commissioners of the county. No deduction can be made on account of commission to the county treasurer.
2. Settlements of treasurer's accounts by the county auditors allowing a special or other commission out of moneys collected for a school district are not binding upon the district. School districts and other creditors of a county are not parties to such settlements, and therefore are not affected by them.
3. Where a debt against a county for money had and received is presently payable on demand, and the party entitled to receive the money neglects for more than six years to make demand, and there was no reason for the delay, the statute of limitations is a bar to the recovery of such a debt.

Case stated. Opinion delivered *December 31, 1873*, by

ELWELL, P. J.—The best exponents of the legislative mind are the words of the statute where they are free from ambiguity. Where they are not we must resort to legislation on kindred subjects, to the spirit of our institutions, and the habits of community, to ascertain the intent of the legislature: Dwaris on Statutes, 193–196; 1 Harris, 166.

Guided by this well-established canon of construction there is no difficulty in ascertaining the legislative mind upon the subject in hand, to wit: the right of county commissioners to deduct from money collected for a school district on unseated lands such sum

[*Original Edition, p. 33.]

as they may allow to the treasurer of the county as a commission. It is provided by the 34th section of the act of 8th May, 1854, Purdon's Digest, 246, that, whenever a school tax assessed on unseated lands in any district shall not be voluntarily paid by the owner thereof, the collector shall certify the same to the proper county commissioners, who shall enforce the collection thereof, with the taxes assessed on unseated lands for county purposes; and when so collected shall be paid to the district treasurer by orders drawn on the county treasury.

The words of this statute are not only free from ambiguity, but they are also positive and mandatory. The whole tax is to be certified—the collection thereof is to be enforced, and when collected shall be paid over to the district.

The statute is of itself so clear and plain that it admits of no argument to prove its meaning. But by reference to legislation on kindred subjects we shall find, that in all cases where money is directed to be collected for a township or district by the county the amount so collected is to be *paid, unless provision is expressly made for deducting the expense of collecting from the fund.

The imposition and collection of taxes are wholly regulated by statutes. Taxes on unseated lands, not being a charge upon or collectable from the owner, but only by proceeding against the land itself, provision was early made in the history of the State for collecting taxes on such lands for county purposes. Township officers had no means of collecting an unseated land tax, nor were they authorized to certify the amount levied for any purpose, until the passage of the act of 6th April, 1802-3, Smith's Laws, 516. By that act supervisors were authorized to return to the county commissioners the road taxes laid by them on unseated lands. Whereupon the commissioners were required at once to draw an order for the amount of the tax, and the county treasurer was required to pay such order forthwith. By the act of 30th March, 1811 (still in force), the law was so far changed as to relieve the county from payment until the money was collected; but the provision was again repeated that the order should be drawn for the amount of the tax and paid when the money was collected: 5 Smith Laws, 251.

The first act of assembly providing for a general system of education in this State was passed on the 13th June, 1836, Pamphlet Laws, 525. By the 7th section provision was made for collecting taxes on unseated land for school purposes, and payment of the same to the proper district, in the same language employed in the act of 1854. This provision, however, only applied to accepting districts. As to non-accepting districts the county commissioners were required by the 16th section of the same act to collect from them an amount necessary to educate the poor gratis, providing, however, that the expense incurred thereby should be paid out of the fund levied on the district.

It is a maxim of the law that the naming of one thing excludes another. By expressly providing for the expenses of collecting the

taxes levied for a non-accepting district the idea of imposing them on accepting districts is clearly excluded.

In every statute which requires the county treasurer to collect money for the commonwealth he is authorized to retain his commission out of the money collected. But in regard to county matters he is required to receive all money due or accruing to the county—to pay out the same on orders drawn by the commissioners, and to pay over to his successor all the money in his hands. For this service he is to receive a certain amount per cent. to be fixed by the commissioners and auditors. Money collected from unseated lands for school taxes is clearly “money accruing to the county.” The commissioners are requested “to enforce their collection.” They are to be paid out on orders drawn upon the county treasurer. They are paid into the treasury, and differ from other funds only in this—that they must be applied to a special object: *Potter County vs. Oshtemo Township*, 11 Wright, 163. It is clearly shown by Judge White, whose opinion in this case was affirmed by the Supreme Court, that the county must respond for the delinquencies of the county treasurer in respect to taxes collected for townships. The bond of the treasurer is to the county. Townships and school districts have no security direct from the treasurer. They must look to the county or be without redress. It is unnecessary to say more upon the subject of such taxes being county funds, as the point is expressly ruled in the case just cited. It follows that it is the business of the commissioners to draw orders for the full amount of claims against the county, and of the treasurer to pay them in full. In the settlement of his accounts the commissioners must see to it that he is charged with all money received from whatever source. If he fails thus to account, or if the auditors allow him as commissions or otherwise more than he is entitled to, the county should appeal from the settlement; if it does not the county will be concluded as between it and the treasurer. Although all money received by the treasurer is considered as being in the county treasury, yet the accounts should be kept separately with the several school districts for the sake of convenience.

The practice in the several surrounding counties in regard to unseated land tax collected for townships and school districts is so variant that it affords no aid in giving construction to the act of 1854.

In Northumberland county, as I am informed from an official source, “all money collected by the treasurer on unseated lands remains in the hands of the treasurer, and he pays it out to the president of the school boards. This fund does not go into the county fund, as the treasurer is responsible to the different boards as if it were his own fund and retains 2½ per cent. as his fee, taking a receipt for the full amount.”

In Luzerne county, as I am informed by the clerk to the commissioners, “the commissioners do not draw orders on the treasurer for school, road or poor taxes collected on unseated lands. The proper person as school or township treasurer receipts to the county treasurer for the amount less five per cent. of such tax collected.”

[*Original Edition, p. 35.]

In Lycoming county a similar practice prevails. No orders are drawn by the commissioners for road or school money. The treasurer deducts five per cent. and pays the balance to the district or township treasurer.

In Columbia county the treasurer is charged with the money received less eight per cent., and pays out that which is charged against him on orders drawn by the commissioners.

In Schuylkill county the clerk states, "the commissioners draw their order in favor of the proper school district for the whole amount of the tax paid into the treasury (for that district), as the law requires. He gets his per cent. on all money received by him and paid out during the year." From these statements, coming from counties having a large amount of unseated land tax to disburse, it will be seen that there is scarcely any *uniformity in the practice of the several offices, nor in the amount improperly withheld from the school district. By following a practice adopted by some interested officer of former years instead of taking the plain words of the statutes for a guide, errors are often perpetuated and come to be considered as law. But practice which is in the very face of a statute cannot be allowed to annul the law. The practice which is regulated by what "the law requires" is the only one which can affect the rights of parties having claims against a county.

The proper and only correct mode of proceeding is to charge the treasurer with all the money received by him, and give him credit for county orders returned and the commission allowed.

In this manner the treasurer obtains credit for all he is entitled to, and his commission is not taken from the amount which the law declares shall be paid over to school districts for the meritorious purpose for which it was allowed to be collected. And I may here add, that in the absence of a law authorizing it, the commissioners have no more right to deduct for services of the treasurer than they would have to charge for services of their clerk in furnishing to the school district a copy of the last adjusted assessments. It is a duty enjoined by law, and is compensated for out of the county treasury. But if the law allowed payment of the treasurer's commission to be made specially out of the fund collected for the school district, it is difficult to understand why it should be much larger than that paid for like services in collecting taxes for county purposes proper.

It appears by the case stated that annual settlements have been made by the county auditors with the treasurers who have withheld their commissions from the fund collected for the school district, in which settlements they are charged only with the balance of the money after such deduction, and that for such balance orders have been drawn by the commissioners, upon which the money has been paid. These settlements not having been appealed from, the counsel for the county contends that they are conclusive upon the school district, and bar a recovery in an action of law.

In my judgment this cannot avail as a defence, for the simple reason that the school district was no party to the settlements: *Alcorn vs. Commonwealth*, 16 P. F. Smith, 172. The county auditors

constitute a special tribunal of limited jurisdiction. They are authorized to settle the accounts between the sheriff, coroner, treasurer and commissioners and the county; but not between the county and its creditors. From their adjudications, no appeal can be taken, except by the county or the officer. No other party has occasion to appeal, because no other party is bound by their judgment.

In this case no notice of the settlements was given to the school district, and for that reason, if there were no other, they are of no force or effect: *Wilson vs. Clarion County*, 2 Barr, 17; *Blackmore vs. Allegheny County*, 1 P. F. Smith, 160.

*The remaining question submitted is, whether the statute of limitations is a bar to the recovery of money received by the county more than six years before suit brought. The county received the taxes belonging to the school district in each of the even years 1860 to 1872 inclusive, and paid to the district in each year by orders drawn on the treasurer, the amount received, less eight per cent. This suit was brought in November, 1872, more than twelve years after the first money was received, and more than six years after the receipt in 1866. A special demand was made for the amount of the commission in July, 1872.

It is evident from the facts stated, that the officers of the school district knew the amount of their transcripts, and that the money had been collected thereon, as they obtained orders from the commissioners in every instance shortly after the money was collected, less the commission.

Counties, like persons, are subject to the statute of limitations. The maxim that time does not run against or bar the sovereign does not apply to them: *Glover vs. Wilson*, 6 Barr, 290; *Evans vs. Erie City*, 16 P. F. Smith, 228. If they may be barred by the statute, they may plead it as a defence.

The claim of the plaintiff here is not, as argued by counsel, based upon an implied contract, arising remotely out of the compact of government. It is simply a demand for money had and received for the recovery of which assumpsit would lie upon an implied promise to pay on demand. It is contended that if this be so, the statute did not begin to run until after demand, inasmuch as no action could be sustained before that against the county. This is unquestionably correct, so far as regards the necessity for a demand before suit brought. But it does not follow that if a party making a claim is guilty of great delay, that he can postpone at will the operation of the statute. Even where the parties sustain the relation of attorney and client, or agent and principal, delay will bring the party who ought to have demanded an account or settlement, within the operation of the statute. "Though in many instances a demand may be necessary before suit brought, yet the want of it when it is the party's own neglect, will not stop the running of the statute:" *Alexander vs. Lackey*, 9 Barr, 120; *Campbell vs. Boggs*, 12 Wright; *Pittsburg & Conn. R. R. Co. vs. Byers*, 8 Casey, 22; *Rhines vs. Evans*, 16 P. F. Smith, 192; *Whethan vs. Penna. & N. Y. Canal and R. R. Co.*, 5 Legal Gazette, 78.

This case is within the principle of these decisions so far as re-

[*Original Edition, p. 37.]

gards the claim for money received by the county more than six years before suit brought. For the several sums unpaid, received since 1866, the plaintiff is entitled to judgment.

Judgment for the plaintiff for the sum of two hundred and fifty-nine dollars and thirty cents.

S. Knorr and A. C. Smith, Esqs., for plaintiff.

J. G. Freeze and R. F. Clark, Esqs., for defendant.

**Second Judicial District.*

Court of Common Pleas, Lancaster County.

BROWN vs. HAMBRIGHT.

Proceedings in an action before a justice of the peace will be set aside when it appears there had been a continuance without day, and afterwards the justice proceeded to hear and pass judgment in the cause without notice to the defendant.

Certiorari. Opinion delivered January 17, 1874, by

LIVINGSTON, P. J.—In this case, the proceedings returned by the justice show that a summons was issued by Samuel Evans, Esq., to constable McGinnis, at the instance of Jos. Brown, Jr., by his next friend Jos. Brown, Sr., against Eml. L. Hambright, on April 18, 1873, which was served April 18, and returnable on April 26, 1873. That on April 26, 1873, the parties met, and the cause was continued by consent until May 3, 1873, then it was again continued (but not by consent, for an unusual length of time), from May 3, to June 7, 1873, and notice on May 30, 1873, sent to defendant, through the mails of the time of hearing. That on June 7, 1873, plaintiff appeared. Defendant did not appear. Plaintiff was sworn and after hearing him the justice gave judgment in his favor, and against the defendant, for \$26, and costs of suit. On this judgment, the justice issued execution July 3, 1873, and on July, 1873, the execution was superseded by the certiorari.

The testimony presented by the defendant on the argument shows, that he resides at Mountville (the residence of the justice being in Columbia); that, at the time originally fixed for the hearing, he attended at the office of the justice, and the plaintiff did not appear; defendant was then informed by the justice that the hearing was continued at plaintiff's request for one week; that at the second time set for the hearing, plaintiff was in Philadelphia and telegraphed to the justice that it would be impossible for him to attend. That afterwards, the next week, the defendant went to Columbia and saw the justice, who informed him that there was no time fixed for a hearing, but that he would see plaintiff, and would then notify defendant of the time appointed for hearing the case, and this was the last he heard of the suit, until the execution was served upon him, never having received notice of the last time fixed for hearing the case, by mail or otherwise.

The cause was adjourned on May 3, 1873, without day, because of the failure of plaintiff to attend. The magistrate afterwards fixed June 7, 1873, as the time for hearing, a period of thirty-five days from the time of adjournment, and then, without having any notice

[* *Original Edition, p. 38.*]

served on defendant and proof of such service made before him, proceeded to hear and determine the case, in his absence, giving judgment as above stated.

*This, we think, he had no authority of law for doing. After he had adjourned or continued the cause without day he had no more authority to proceed further with it, to hear or pass judgment on it, without having notice served on defendant and proof of such service made before him, than he would have had to proceed to hear it and pass judgment without having a summons served upon defendant in the first instance and proof thereof made before him; his judgment in either case would be void.

If this were not so parties would be deprived of the opportunity and right of appeal. So carefully has the law and the court guarded the rights of parties in this respect that if, after the hearing of a cause, in presence of both parties, the justice holds the matter under advisement, without designating a day upon which he will enter judgment, he is bound to notify the defendant when he does enter the judgment, and he can issue no execution which will not be set aside, nor will the twenty days allowed for appeals commence to run in such case until defendant has had such notice. And this is a rule of authority and reason; a different practice would place a defendant at the mercy of the justice and enable the latter, by entering a judgment, as in this case, privately and without notice to deprive him of the right and privilege of making a defence as well as of his appeal.

The proceedings are therefore reversed and set aside.

Rosenmiller, Esq., for plaintiff.

A. Kauffman, Esq., for defendant.

First Judicial District.

District Court of Philadelphia.

DYER vs. THE PEOPLE'S BANK.

A creditor who denies in his answer a married woman's title to real estate and alleges that the property belongs to her husband, will not be enjoined from levying on it and selling it as the husband's property. Under such circumstances a court of equity will not investigate the title but leave the parties to contest it at law.

In equity. Motion for a preliminary injunction. Opinion delivered *January 17, 1874*, by

THAYER, J.—The plaintiff is a married woman, and it appears by the bill and affidavits filed that the defendants, having recovered a judgment against her husband, have issued a *fi. fa.* against him under which there has been a levy and condemnation of a lot of ground which is alleged to be the sole and separate estate of the wife, and the defendants are about to have the same sold upon execution by the sheriff. She therefore seeks to enjoin the defendants from so doing. The bill sets forth very minutely the manner in which the plaintiff's title was derived and the payment of a *portion of the purchase money by the plaintiff out of her separate estate. The answer, while it does not explicitly deny all the material

[*Original Edition, pp. 39 and 40.]

allegations of the bill, nevertheless denies the fact of the wife's ownership, controverts her title, and alleges that the real ownership is in the husband. It charges that the property in question was conveyed to the plaintiff by Joseph Shantz about six weeks after a conveyance had been made to him by the husband of the plaintiff. That at the time of the conveyance the husband was insolvent and that the property is worth much more than the plaintiff alleges she paid for it.

The plaintiff relies on *Hunter's Appeal* (4 Wright, 194). But it is to be observed that the circumstances under which *Hunter's Appeal* was decided were peculiar. In that case there was no denial of the wife's title and ownership. The defence was rested solely upon the ground that the injunction ought not to be awarded because the plaintiff had an adequate remedy at law by defending her title in an action of ejectment, to which the sheriff's vendee must be put in order to assert his right to the possession. The present case is quite different. Here the wife's title is peremptorily denied, facts averred which, to say the least, bring its validity in question and throw upon her the burthen of establishing by competent evidence that it was fairly and honestly acquired by her own separate means. Such an inquiry, by the practice of the courts of this State from the foundation of the commonwealth, has always been conducted through the instrumentality of an action at law and the verdict of a jury. Where her title is denied a married woman cannot prevent her husband's creditor from contesting her title in the usual manner or withdraw the decision of the facts from a jury by means of the summary process of a court of equity. If anybody has supposed that *Hunter's Appeal* is an authority for awarding an injunction, except in cases where the wife's ownership is not denied, he must correct his judgment by *Winch's Appeal* (11 P. F. Smith, 424), where the limits of the former decision are strictly defined and the wife is remitted to the old remedy in all cases in which her title is challenged by her husband's creditor.

Silas W. Pettit, Esq., for the motion.

Charles Gilpin, Esq., contra.

**Second Judicial District.*

Court of Common Pleas, Lancaster County.

A. D. HUMMER vs. EPHRATA SCHOOL DISTRICT.

When a defective recognizance has been entered on an appeal by a treasurer of a school district, the proper course is to call upon the appellant by rule to perfect his bail within a specified time.

Rule granted to show cause why the appeal should not be stricken off. Rule to show cause why plaintiff should not be permitted to perfect his recognizance by adding another surety. Opinion delivered January 17, 1874, by

LIVINGSTON, P. J.—The report of the township auditors in the case before us appears to have been left with the town clerk of

[*Original Edition, p. 41.]

Ephrata township on August 4, 1873. On August 22, 1873, A. D. Hummer, treasurer of Ephrata township school board, entered his appeal therefrom in the prothonotary's office at Lancaster, and at the same time entered into and filed a recognizance with one surety, in the sum of one thousand dollars, being more than double the amount in controversy, conditioned to prosecute his appeal with effect and to pay the costs and such sum of money as he shall appear, by the verdict of a jury, to be indebted to said school district, etc., and so far as the responsibility of the parties bound to perform the condition of the recognizance is concerned there seems to be no question. But the recognizance is deficient in this that it contains the name of but one surety, whereas the act of assembly under which the appeal is taken requires two sufficient sureties. The only real cause of complaint being a defective recognizance, the question presented is, shall the appeal be stricken off or shall leave be granted to perfect it? Reasoning by analogy, we are of opinion the latter course should be pursued.

In cases of defective recognizances, given on appeals from justices of the peace, aldermen and arbitrators, the Supreme Court, commencing with *Means vs. Trout*, in 1827, and continuing up to the present time, say "That if the recognizance given on appeal from the award of arbitrators or a justice of the peace be defective, the party should be called on by a rule to perfect his bail within a given period, or, in default thereof, to have his appeal dismissed," the court ought not to quash the appeal in the first instance.

In *Means vs. Trout*, 16 S. & R. 349, Gibson, C. J., says: "The recognizance is undoubtedly bad, but the question is whether the appellee has pursued the proper course? Great hardship has, I fear, been suffered in consequence of the strictness with which these matters have been considered in this court. When bail has been defectively given within the *period prescribed, there can be neither injustice nor hardship in suffering the appellant to perfect it as soon as the defect is discovered; such a practice would be in analogy to bail at common law. On the other hand, if a defect in the recognizance were irreparable, the appeal would be lost and a great constitutional right frustrated; such a mischief would be intolerable, etc. The proper course, therefore, will be to call upon the appellant by a rule to perfect his bail within a specified time; or, in default thereof, to have his appeal quashed." Ibid, *Noble, for use of Wray, vs. Houck*, page 421.

In *The Burgess, &c., of Huntingdon vs. Jackson & Clark*, 2 Penna. Rep. 431, decided in 1831, Rogers, J., says: "The proper course for the appellee, as was decided in *Means vs. Trout*, was to call upon the appellant to perfect his bail in a specified period, or, in default, to have his appeal quashed."

In *Bream vs. Spangler*, 1 W. & S. 378, defective recognizance on appeal, decided in 1841, the court say: "This is a case of clear mistake by the justice, as well as the appellant, and the latter ought to have been suffered to perfect his bail, on the principle of *Means vs. Trout*. It does not appear that the appellee was too late with his motion to quash, an adjourned court being part of the term. But

[*Original Edition, p. 42.]

it is clear it ought not to have been granted." The order to quash was reversed, and the appeal reinstated. The same principle is also fully recognized in *Weidner vs. Matthews*, 1 Jones, 336, decided in 1849, and in *Carr vs. McGovern*, 16 P. F. Smith, 457, decided in 1870.

We therefore discharge the rule to show cause why the appeal should not be stricken off, and make absolute the rule to show cause why the appellant should not be permitted to perfect his recognizance, by adding another surety, and we do order and direct that the recognizance be so perfected within fifteen days from this date.

S. H. Reynolds, Esq., for plaintiff.

N. Ellmaker, Esq., for defendant.

Supreme Court of Pennsylvania.

SHISLER vs. KEAVY.

1. Where there is an agreement to refer to arbitrators in an action pending, consent to make it a rule of court will be implied.
2. After the execution of the submission it is beyond the control of either party and cannot be revoked.

Error to the District Court of Philadelphia. Opinion delivered January 18, 1874, by

MERCUR, J.—The parties, by writing filed March 7, 1871, agreed to refer all matters in controversy, in a pending suit, to three persons named, under the act of 16th June, 1836. They further agreed, that the submission should be made a rule of court, and that each party should be bound *and concluded by the award of referees, or of a majority of them, "without the right to appeal, file exception, or take out writ of error." It is claimed, however, that the award is invalid by reason of the omission to file the affidavit directed by the second section of said act. It is true, it was said in *Wall's Administrators vs. Fife*, 1 Wright, 394, that the agreement and submission are not entitled as a matter of right to be entered on the docket by the prothonotary without the affidavit. But neither this section nor the decision referred to applies to a submission and rule in a pending suit. If either did so apply, the filing of the affidavit might be waived by the parties. Their subsequent written agreement, filed June 20, 1871, whereby they agreed that another person named be substituted as an arbitrator in the place of one of the former, who had declined to serve, was such a waiver that the absence of an affidavit cannot now be successfully interposed. Besides, when the submission is in a pending action it is unnecessary to expressly stipulate that it be made a rule of court: *McAdams' Executors vs. Stillwell*, 1 Harris, 90; *Buckman vs. Davis*, 4 Casey, 211; *Quay vs. Westcott*, 10 P. F. Smith, 163; *Sumury vs. Hiestand*, 15 P. F. Smith, 309. Where there is an agreement to refer in an action pending, consent to make it a rule of court will be implied: *Painter vs. Kieler*, 9 P. F. Smith, 331.

The other ground urged against the validity of the award is the revocation of the submission. The record shows that upon the same day on which the award was made and signed the plaintiff in error filed a "withdrawal from rule of arbitration." Which was first in point of time the record does not show. That the with-

[*Original Edition, p. 43.]

drawal preceded the making of the award, the plaintiff in error sought to establish extrinsic to the record. It is the province of the court below to take cognizance of and correct the errors not shown by the record of the arbitrators, just as it would remedy those committed by a jury, on a motion for a new trial, and its decisions cannot be reviewed unless there be errors of law apparent upon the record itself: *Kline vs. Guthrie*, 2 P. R. 495; *Sands vs. Rolshouse*, 3 Barr, 457; *Rogers et al. vs. Playford*, 2 Jones, 181; *Buckman vs. Davis*, 4 Casey, 211. The depositions or other evidence are no part of the record, and although they may be sent up with the record, should not be considered in this court: *Browning vs. McManus*, 1 Wh. 177; *Rogers vs. Playford*, *supra*; *Brown vs. School Directors*, 6 Harris, 78; *Dodds vs. Dodds*, 9 Barr, 315. As the reasons given by the court for dismissing the exceptions constitute no part of the record, the opinion which was thereupon filed cannot be considered. The parties agreed not "to appeal, file exception, or take out writ of error." It was said, in *Rogers et al. vs. Playford*, *supra*, there is no paramount reason of public policy forbidding an agreement that their decisions should be beyond the reach of further inquiry or revision. Hence it was held if an agreement to submit a case to arbitration provide that the award shall be final and conclusive, and that neither party shall have a right to appeal or file exceptions to it, the parties are concluded by their agreement and have withdrawn from the court its power to rectify a mistake of fact on the part of the referees, on exceptions filed to their award: *McCahan vs. Reamy*, 9 Casey, 535, and cases there cited.

While the general power to revoke a submission is well settled, yet after its execution it is beyond the dominion of either party, when the submission has assumed the form of a contract upon a sufficient consideration. Hence, a submission to a final reference in consideration of a discontinuance of proceedings in chancery for an account, was held to be irrevocable: *McGheehen vs. Duffield*, 5 Barr, 497.

The record shows that the hearing before the referees after they had met was twice adjourned upon the application of the plaintiff in error, before he attempted to revoke the submission. His alleged notice of revocation was given to one only of the referees. It was expressly ruled in *Dickinson vs. Rorke*, 6 Casey, 390, that when a submission is in writing, it cannot be revoked, except by a written instrument given to the arbitrators, or a majority of them.

The court below having dismissed the exceptions and entered judgment upon the award, we discover no such error as to require us to disturb it: *Buckman vs. Davis*, *supra*. Judgment affirmed.

A. Thompson, Esq., for plaintiff.

W. L. Hirst, Esq., for defendant.

Western District.

Supreme Court of Pennsylvania.

McGUINNESS vs. THE COMMONWEALTH.

1. It is sufficient for a jury to find the party to be an habitual drunkard: the legal consequences flow from that fact.
2. The inquisition stands until overthrown by the evidence of the traverser.

[*Original Edition, p. 44.]

Error to the Court of Common Pleas of Allegheny County. Opinion delivered *January 6, 1874*, by

AGNEW, J.—Issues of fact, whether by way of traverse or a feigned issue, when tried before a jury according to the course of the common law, have always been deemed the subjects of a writ of error. The trial is conducted, and bills of exception taken to the evidence or the charge as in other trials before a jury. Hence when the legislature provided a writ of error in the case of feigned issues from the Orphans' Court, it declared that the writ should lie in the same manner as in cases where feigned issues are directed by a Court of Common Pleas: act 10th April, 1848, 1 Bright. Dig. 603, pl. 5. Issues of fact in cases of distribution were also made subject to a writ of error: 1 Bright. Dig. 656, pl. 107. *To put an end to all doubt on the subject of feigned issues, the act of 12th February, 1869, P. L. p. 3, extended the writ of error to all cases of feigned issue where exceptions have been or shall be taken to the rulings or charge of the court: 1 Bright. Dig. 604, pl. 9. The traverse of the inquisition of lunacy or habitual drunkenness, is by the act of 13th June, 1836, § 12, assimilated to cases of traverse upon untrue inquisitions of office found: 2 Bright. Dig. 982, pl. 15. Such traverses are common law proceedings, and among them is enumerated the inquisition of idiocy *a nativitate*: 3 Black. Com. 258. The traverse of the lunatic or habitual drunkard under the act of 1836 being of like nature, the writ of error lies to the rulings or charge of the court; and the motion to quash is therefore denied.

The fourth and fifteenth assignments of error raise the question as to the mode of proceeding upon the trial of the traverse. The commonwealth gave in evidence the inquisition and finding of the jury, that John McGuinness, the traverser, was an habitual drunkard, which were objected to and received under exception, and then rested. The traverser gave evidence to disprove the finding of habitual drunkenness. The commonwealth then offered to rebut by evidence in support of the finding, to which it was objected that such evidence was in chief, and ought to have been given before the traverser began his evidence. But the mode of proceeding was clearly right. The finding of the inquisition stands until it is set aside or disproved, and it may be unnecessary for the commonwealth to give any evidence. This effect of the finding is *prima facie*, according to many decisions, throwing the burthen of disproof on the lunatic or habitual drunkard: *Hutchinson vs. Sandt*, 4 Rawle, 234; *Willis vs. Willis*, 2 Jones, 159; *Gangwere's Estate*, 2 Harris, 417; *Klohs vs. Klohs*, 11 P. F. Smith, 245. In *Ludwig vs. Commonwealth*, 6 Harris, 175, Justice Rogers said of the finding by the inquest, "his incapacity, in that event, is a conclusion of law, it is not necessary to say it is *presumptio juris de ure*, but, at least it throws the burthen of capacity on the traverser."

The case of *Rogers vs. Walker*, 6 Barr, 371, really decides the point before us, for there it was contended that after the defendant's proofs were given in rebuttal, the finding was to be laid out of the case, but Gibson, C. J., denied this, saying that, "like a legal presumption an inquisition continues to operate till overpowered, and standing

[*Original Edition, p. 45.]

as full proof till then, it necessarily remains before the jury, till the question of sanity has been decided by them. It consequently stands as a particular in the proofs. See also the remarks of Thompson, C. J., in *Lecky vs. Conyngham*, 6 P. F. Smith, 373. The effect of the finding, even when a traverse is put in, is to place the care and custody of the estate of the lunatic or habitual drunkard in the hands of the court: section 13, act 13th June, 1836, 2 Bright. Dig. 982, pl. 16. Indeed, even before the return of the inquisition, but after a finding of lunacy, it has been held that a receiver may be appointed: **Kenton's Case*, 5 Binney, 613. It follows, therefore, that the commonwealth might, in the first instance, rely on the finding, and afterwards in answer to the evidence of the traverser, have the right to go into full proof of his habitual drunkenness. According to Sir Wm. Blackstone, the traverser, in the case of an inquisition of office found, must be considered the plaintiff, and must, therefore, make out his own title, as well as impeach that of the crown: 3 Com. 260.

It is unnecessary to say anything as to other assignments of error, except that under the act 13th June, 1836, it is sufficient to find the person an habitual drunkard. The legal consequences flow from that fact, and not from any supposed or actual capacity of the habitual drunkard to manage his business well. When the habit of drunkenness is found, the law itself establishes the incapacity. It is, therefore, not the province of the jury, upon a traverse of the inquisition, to determine the extent of the traverser's ability to transact his business. They decide, only, the habit of drunkenness: *Ludwick vs. Commonwealth*, 6 Harris, 173; *Sill vs. McKnight*, 7 W. & S. 244.

Judgment affirmed.

First Judicial District.

Court of Quarter Sessions, Philadelphia.

COMMONWEALTH vs. MAGEE.

1. A judge may, where the evidence is uncontradicted, tell the jury that it is their duty to convict.
2. *Commonwealth vs. Keenan*, 30 Legal Intelligencer, 417, followed.

Motion for a new trial and in arrest of judgment. Opinion delivered December 6, 1873, by

PEIRCE, J.—This motion is made on two grounds:—

1. For errors in permitting the commonwealth to stand aside jurors without showing cause of challenge until the panel had been called.

2. For misdirection of the judge in his charge to the jury.

The first question has been disposed of in the opinion of Allison, P. J., delivered this day in the case of the *Commonwealth vs. Keenan*, Legal Intelligencer, volume 30, page 416, for selling liquor without a license, affirming the right of the commonwealth in cases of misdemeanor to stand aside jurors, as had previously been affirmed in cases of felony in *Commonwealth vs. Morrow*, 3 Brewster, 402.

[* *Original Edition*, p. 46.]

The evidence against the defendant was clear and explicit by two witnesses, who testified to having bought and drunk liquors at the defendant's place within this year; one said he thought it was in the month of April; the other said, "one time was in April, I remember."

*The defendant offered no testimony. There was nothing in the matter of the witnesses to call in question their veracity, or in the slightest degree to impugn their evidence. The counsel for the defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law and the motives of the prosecutors.

Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. After carefully stating the evidence to them, I told them that I had no hesitation in saying that it was their duty to convict the defendant. The counsel for the commonwealth states the charge to have been "The judge declared that he had no hesitation in saying, that under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment." But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made.

I perceive no error in this. It was not a direction to the jury to convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their mere will and pleasure. Where, however, the testimony is contradicted by testimony on the other side, or a witness is impeached in his general character, or by the improbability of his story, or his demeanor, it would be an unquestionable error in a judge to assume that the facts testified to by him had been proved.

In *Delany vs. Robinson*, 2 Wharton, 507, Chief-Justice Gibson says: "It will not be pretended that a jury may find capriciously and without the semblance of evidence, or that the court may not set aside their verdict for palpable error of fact; and if it may subsequently unravel all they have done, why may it not indicate the way to a wholesome conclusion in the first instance. . . . Without this process of judicial review causes would frequently be determined, not according to their justice, but according to the comparative talents of the counsel. To hold the scales of justice even, a judge may fairly analyze the evidence, present the question of fact resulting from it, and express his opinion of its weight, leaving the jury, however, at full and active liberty to decide for themselves. The judge who does no more than this, transcends not the limits of his duty." This was said in a case in which there was a conflict of testimony.

It is the duty of the court when it is decidedly of opinion that the evidence given by the plaintiff, supposing it to be all true, does

[*Original Edition, p. 47.]

not tend to prove such facts as will in law entitle him to recover, to tell the jury *so. And if the jury were, after such direction from the court, to find a verdict for the plaintiff, it would be the duty of the court to set it aside and grant a new trial: *Matson vs. Fry*, 1 Watts, 435, Kennedy, J.

To submit a fact destitute of evidence, as one that may nevertheless be found, is an encouragement to err, which cannot be too closely observed or unsparingly corrected: *Slooppe vs. Latslaw*, 2 Watts, 267, Gibson, C. J.

It is an error in the court to submit a fact to the jury of which there is no proof: *Miller vs. Cresson*, 5 W. & S. 284.

When the evidence on a question is all one way the court is justified in not transmitting the question as one of fact to the jury. *United States vs. 1 Still*, 5 Blatch. C. C. 403. See also *Davis vs. Handy*, 6 B. & C. 154, in which Abbot, J., says: "Where a witness is unimpeached in his general character, and uncontradicted by testimony upon the other side, and there is no want of probability in the facts which he relates, I think a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly."

To warrant an unqualified direction to the jury in favor of one party or the other, the evidence must either be undisputed, or the preponderance so decided that a verdict against it would be set aside and a new trial granted.

The rule with regard to the positive instruction of the court to find facts, admits of the qualification that where the verdict is in strict accordance with the weight of evidence, and justice has consequently been done, a new trial will not be granted, though the direction be positive. *Graham and Waterman on New Trials*, 751.

There are occasions when it becomes the solemn duty of a judge, in maintenance of the law and furtherance of public justice, to express his opinion clearly and unmistakably upon the facts submitted in evidence. And this was one of these occasions. The law under which the defendant was prosecuted has been openly derided and defied. Bad men have conspired to defeat it. They openly violate it, and perjured witnesses, and juries disregardful of their oaths, have given impunity to the transgressors. And all this has occurred in the very tribunals of justice seeking to administer the law and in the course of its administration. A judge who would hesitate, under these circumstances, to instruct a jury in their duty, would seem to me to be unworthy of the trust reposed in him.

No objection was made to the charge by the counsel for the defendant at the time it was given, and the jury, after deliberate consideration, rendered a verdict of guilty. The motion for a new trial is refused.

Magee was sentenced to undergo an imprisonment in the county prison for six months, and to pay a fine of fifty dollars and costs of prosecution.

Lewis D. Vail and Geo. D. Stroud, Esqs., for commonwealth.

Jos. A. Bonham and James A. Heverin, Esqs., for defendant.

[* Original Edition, p. 48.]

Twenty-first Judicial District.*Court of Common Pleas, Schuylkill County.****AUDITORS OF SCHUYLKILL CO. vs. COMMISSIONERS.**

1. County auditors are clothed with extensive powers, to enable them to correctly audit, adjust, and settle the accounts of the several officers subject to their supervision.
2. When the report of the county auditors has been filed in the proper office, it is final and conclusive, and the auditors have no further power over it.
3. Appeal from the account of the auditors as filed, is the only way in which the action of the court can be invoked.

Opinion of the court delivered *February 9, 1874*, by

PERSHING, P. J.—This is a controversy between the county auditors and county commissioners, and the facts which give rise to it are as follows: The auditors met in pursuance of law, in January last, and proceeded to audit, adjust, and settle the accounts of the county treasurer and county commissioners. Their report was filed in the prothonotary's office, and bears this endorsement: "Auditor's Report, Schuylkill Co., Penna., 1873, filed January 21, 1874. George A. Herring, treas." What accounts were embraced in the report appears from the certificate of the auditors at its conclusion. They say: "We, the undersigned, auditors for the county of Schuylkill, respectfully report, that we have audited, adjusted, and settled the accounts of the commissioners and treasurer of said county, and present the foregoing statement as the result of our investigations. . . . In conclusion, we would say that we have had presented to our inspection bills for all orders drawn by the commissioners, except for two, which are fifty dollars each, drawn in favor of Mr. Valentine Benner, one of the board of commissioners, for travelling expenses. The reasons given for their non-production are, that they were either mislaid, or that on account of press of business at the time, were neglected to be made out."

Two days after this report was filed, viz., on the 23d of January, 1874, the auditors issued their subpoena requiring the commissioners and their clerk to appear before them, on the 26th day of January, 1874, to testify their knowledge in the matter of auditing the accounts of the commissioners of Schuylkill county, for the year 1873, and to produce all the books, papers and vouchers, showing the expenditure of the commissioners of Schuylkill county, for the year 1873. The commissioners refused to obey the commands of the subpoena, whereupon an attachment was issued by the auditors. This proceeding is now before us by consent, as though writs of *habeas corpus* had issued at the instance of the parties attached, the commissioners and their clerk.

It is claimed by the auditors, through their counsel, that the heading of their report shows a settlement of the accounts of the county treasurer alone; that they have not audited the accounts of the commissioners, and that their proceedings in the matter are regular and legal. It is contended *by the counsel for the commissioners that the allegations of the auditors are in direct contradiction to their certificate, and that the filing of their report is a finality. The jurisdiction of the court is denied, unless an appeal is taken and an issue directed, as authorized by the act of assembly.

County auditors are clothed with extensive powers, to enable

[*Original Edition, pp. 49 and 50.]

them to correctly audit, adjust, and settle the accounts of the several officers subject to their supervision. They can issue subpoenas to obtain the attendance of the officers, their executors and administrators, and of any other persons to be examined as witnesses. They can compel attendance by attachment to the same extent that the Court of Common Pleas may do in cases pending before it, and also the production of all books, papers and vouchers, relating to such accounts as they are required to adjust and settle. Persons swearing falsely are liable to the pains and penalties of perjury, and witnesses refusing to testify may be committed to the county jail, by warrant of the auditors directed to the sheriff or any constable of the county. It is further provided that if any person in possession of books, vouchers, or papers relative to public accounts before auditors, shall refuse to produce the same, or if any officer, whose accounts are to be settled and adjusted by such auditors, shall refuse to attend or to submit to an examination, the auditors shall proceed by the examination of witnesses and other evidence to ascertain and settle, as near as may be, the amount of public money received by such officer, and its application to public purposes or otherwise. The report of the auditors shall be filed among the records of the Court of Common Pleas of the county, and from the time of being so filed shall have the effect of a judgment against the real estate of the officer who shall thereby appear to be indebted either to the commonwealth or the county. An appeal may be made from such report by the county or any officer whose account is audited, to the Court of Common Pleas of the same county, within sixty days after the same is filed, and thereupon the court shall direct an issue to be tried by a jury, upon whose verdict final judgment shall be entered, upon which execution may issue: Br. Purd. pp. 300, 301.

Turning now to the decisions of the Supreme Court on these statutory powers of a board of county auditors, we find it held in the case of the *Commissioners of Lycoming vs. The County of Lycoming*, 10 Wr. 496, that county commissioners are personally liable for moneys paid by their direction, which the county is not legally liable to pay; and that the auditors have the power, and it is their duty on settlement of the commissioners' accounts, to charge them with the amount of money misappropriated by them. The court says in that case: "There can be no doubt not only of the power, but of the duty of the auditors, to take notice of illegal disbursements of the public funds, and to charge the officer who is guilty of misappropriation. It is the only protection the people have against the illegal acts of those who have charge of their pecuniary interests; and the greater complaint is that the auditors too frequently omit their duty in this respect."

*Public officers should be held to a strict and rigid accountability, and in no case should charges for services exceeding the compensation allowed by law, be sanctioned or tolerated: *Godshalk vs. Northampton County*, 21 P. F. Smith, 324. County auditors have all necessary judicial powers to determine the indebtedness to and from the officer whose accounts they audit: *Blackmore vs. The County of Allegheny*, 1 P. F. S. 160.

That the auditors, in making the late settlement, did not call into

[*Original Edition. n. 51.]

exercise the powers vested in them, is not disputed; and we assume that they were not aware of the extent of their legal right to investigate, and to hold to a personal accountability any officer who had misappropriated the public moneys. We have thought it important to call attention to the law upon the subject of the annual auditing of the accounts of the county officers, so that if negligence has existed, or mistakes have been made in the past, they may be avoided in the future.

The real question for our decision is, what is the effect of the filing of the auditors' report? In *Northampton Co. vs. Yohe*, 12 Harris, 305, Judge Woodward, referring to the act of assembly which we have already quoted, says: "It seems to be an obvious deduction, that after a board of auditors have filed their report, they have no further power over it. It passes into the custody of a court of record, becomes a judgment, and is no more subject to the supervision and review of the auditors who made it, than a judgment entered on an award of arbitrators is liable to be overhauled by them."

In a later case, *Blackmore vs. Allegheny Co.*, *supra*, the auditors had failed to charge Blackmore, the treasurer, with one thousand dollars which he had received from a collector. The county brought suit to recover this money, after allowing the time for an appeal from the report of the auditors to go by. The Supreme Court decided that the county could not recover. The county auditors, says Judge Agnew, constitute "a special tribunal, with all necessary judicial powers to determine the indebtedness from or to the officer, and enforce collection in due course of law; and this, under the provisions of the 13th section of the act of March 21, 1806, precludes a resort to an action at common law. The decision of this tribunal is also conclusive, and cannot be inquired into, either by the same tribunal at another time, or by a court of law, except in the manner provided, upon an appeal by the county or the officer. A long line of decisions have set this point at rest." Other decisions are to the effect, that the settlement of the auditors is final and conclusive in favor of the officer as well as against him, and that there is no prescribed form in which their reports shall be made, or the accounts stated, or the balance shown.

Now in view of the facts that the auditors have filed their report, certifying under their hands and seals that they audited, adjusted, and settled the accounts of the treasurer and commissioners, and setting forth with particularity, that for two of the items in the accounts of the commissioners no vouchers were produced, it seems to us entirely clear that under the provisions of the act of assembly, and the decisions of the Supreme *Court, the only way in which the action of this court can be invoked is by an appeal from the account of the auditors as filed. The right of appeal is limited by law to the officer whose accounts are audited, and the county. It is likely, as has been stated, that the commissioners, who represent the county, will not appeal from the settlement that has been made of their accounts. This may show the necessity for such legislation as will extend the right, and enable the taxpayers to intervene between the treasury and the county officers. When in a court of justice, as in this case, the charge is made on the one side of a posi-

[* *Original Edition*, p. 52.]

tive misappropriation, and on the other side, of an attempted misappropriation of the public moneys, the necessity of an intelligent and thorough investigation is very apparent. If the decision we are compelled to make in this case shall even seem to prevent such an investigation, it is to be regretted; but we think it a subject of still greater regret that the auditors, who possess such ample power of inquiring into the condition of the county finances, and into the official conduct of those to whose management they have been entrusted, let slip their opportunity. The parties held on the attachment must be discharged. In this conclusion my brother, Green, who sat with me on the argument, concurs.

Hughes and Farquhar, for auditors. *Lin. Bartholomew*, for commissioners.

Twenty-first Judicial District.

Court of Common Pleas, Schuylkill County.

JACOB SCHEAFER vs. ANDREW SMITH.

A *certiorari* must be applied for within a reasonable time. Laches of the defendant will deprive him of the benefit of any exception to the proceedings had before a justice of the peace.

Certiorari. Opinion of the court delivered *February 9, 1874*, by

GREEN, J.—Had the writ of *certiorari* in the above case issued in time, so as not to show very great laches on the part of the defendant, then we think that some of the exceptions which he has filed would have availed him, and that it would be our duty to reverse the proceedings. But the neglect of the defendant to take out this *certiorari* or the one previously issued, until long after the judgment was rendered, is fatal to his case.

The judgment was rendered on the 10th of February, 1872, the defendant not appearing. The evidence clearly shows that he was informed of the fact upon the same day by the plaintiff. On the 28th he appealed from the judgment, entered bail, and took out a transcript. This transcript he neglected to have filed to the next term (March) of the Common Pleas. The evidence shows that when he sent it to Pottsville to be entered, the first day of the term (March 4) had already passed, and that therefore it was his own neglect that it was not filed in time. Being too late for the entry of the appeal, under ordinary circumstances it was also too late for the issuing of a *certiorari*. This being the state of the case when the *transcript was brought to Pottsville, we think that the advice given by Mr. Seltzer, instead of misleading, was the best that could have been given, viz.: that the defendant should endeavor to get the justice to open the judgment and grant a re-hearing. The evidence shows that application was made to the justice for that purpose, but the justice did not open the judgment, nor make any promise to that effect. Then the defendant, instead of issuing the *certiorari*, appears to have done nothing for a period of between two and three months. He lay quietly by until the 3d of June following, when he was spurred to action by the sharp prick of an execution which had been issued upon the 1st of June, and upon which a levy on his property was made. Then he took out his *certiorari* and stayed the proceedings.

Do not these facts establish such a case of laches on the part of

[*Original Edition, p. 53.]

the defendant as to deprive him of the benefit of any exception to the proceedings before the justice, either in the manner in which the return to the summons was made, or in the want of proper proof of the plaintiff's claim, or if any trick or fraud has been cited by the plaintiff, we are not without authority on this question, and it seems to rule the case completely? Says Black, C. J., in *Lacock vs. White*, 7 Harris, 498, "a judgment obtained by any trick or fraud ought to be reversed, if the *certiorari* be taken within a reasonable time after it is discovered." And the same rule applies where there has been an improper service or even no service at all upon the defendant. He is allowed a reasonable time after the discovery of the proceedings and judgment, to issue his *certiorari*. And this reasonable time has been decided to be twenty days, in analogy to the time allowed to parties to enter an appeal or *certiorari* where parties have been regularly summoned. In *Stedman vs. Bradford*, 3 Phila. Rep. 258, C. P., it is decided, "where a judgment has been given by a justice against a defendant, without summons or notice, a *certiorari* will be allowed, if applied for within a reasonable time, which has been held to be within twenty days after he first had knowledge of the judgment." The proviso of the 21st section of the act of 1810, declares "that no judgment shall be set aside in pursuance of a writ of *certiorari*, unless the same is issued within twenty days after judgment was rendered, and served within five days thereafter." And where the *certiorari* issues after twenty days, "in such case, the party must satisfy the court that his application was made within twenty days after the fact of the entry of the judgment had come to his knowledge:" *Daily vs. Bartholomew*, 1 Ash. 185; *Brookfield vs. Hill*, 1 Phila. 439. As the defendant in this case was informed of the rendition of the judgment, upon the very day it was rendered by the plaintiff, to wit, on the 10th of February, 1872, according to his own testimony, and he did not take out his writ of *certiorari* until the 3d of June following, it is very evident that his neglect is fatal to his case. Nor do we think that he was misled, so as to suffer injury, by the advice he received, or that he has any one to blame but himself for the neglect to have the appeal entered, or the *certiorari* issued in time.

*This disposes of the first three exceptions. The last exception is to the execution—that the execution issued on the first of June, and that no return has been made by the constable to the execution, even though a levy had been made. But this exception is conclusively answered by the first, that the record shows that the *certiorari* was issued on the 3d of June following, and that this operated as a supersedeas to the execution, and that therefore no presumption of payment can arise.

However much we may be inclined to the opinion that the plaintiff took an unfair advantage of the defendant, in going before the justice and obtaining a judgment by default, under the circumstances, for the reasons already given, we think the defendant has lost his opportunity by his neglect, and that the proceedings must be affirmed.

Judgment affirmed.

Wm. D. Seltzer, Esq., for plaintiff. F. W. Bechtel, Esq., for defendant.

Supreme Court of Pennsylvania.

SINGERLY vs. FOX.

1. A receiver, after he has obtained possession of the assets, may, on his sale of them, maintain an action in his own name against the purchaser.
2. If the purchaser is a creditor of the firm he has no right of set-off at such receiver's sale.

Error to the District Court of City and County of Philadelphia. Opinion delivered *January 19, 1874*, by

GORDON, J.—It is no doubt law that a receiver has no legal title in the assets which he is appointed to collect, and that without authority from the court he cannot maintain trover where they have been wrongfully converted previously to his possession: *Yeager vs. Wallace*, 8 Wr. 294. But where the goods have actually come into his possession it can hardly be contended that he could not maintain this action against one who wrongfully invaded such possession and converted the goods committed to his care. Were such not the case he would not rise to the dignity and power of the most ordinary bailee. He would be the merest automaton that ever sprang from a legal workshop. In the case in hand the goods were in the possession of the receiver and were sold by him by virtue of the power conferred upon him by the court for that purpose. The contract of sale was with him, his receipt for the money to the purchaser would have been good to discharge him from the price of the goods; and for them or their price he is responsible. We are of opinion, therefore, that the receiver might maintain this suit in his own name, and that so far the ruling of the court below is right. With reference to the set-off which Singerly desired to set up against the price of the goods which he bought at the receiver's sale, we are equally clear. The court took charge of the partnership of Grim & Bros. on bill filed by one of the partners. In cases of this kind the firm assets pass into the custody of the court to await settlement between the partners. They must pass into the hands of a master for distribution. Primarily the debts of the firm are to be paid from its assets. If the firm is solvent then those debts will be **fully paid*, if not, then *pro rata*. Now, if each creditor be allowed to purchase goods at the receiver's sale, and pay for them by a set-off, we can readily see how at least this part of the proceedings of the court of equity might degenerate from a regular and orderly process to a mere scramble for the debtor's goods. We can further see, that if the partnership prove insolvent, one creditor may get his whole claim, and another nothing. It is obvious, therefore, that the rule claimed by the defendant below would be pregnant with disorder, and would introduce uncertainty and irregularity, where the contrary is of super eminent importance. We cannot, therefore, consent to sanction such a rule.

We may say, in conclusion, that it is a mistake to suppose that the defendant had a lien upon the goods by virtue of his lease. The act of assembly requires the sheriff to pay out of the proceeds of his levy and sale of the tenant's goods to the landlord a sum not exceeding one year's rent, but this is by virtue of the directions of the act in that special case, and not because of any lien. This act is no doubt based upon the idea, that it would be inequitable to

[**Original Edition, p. 55.*]

take from the landlord that which he regarded as his security for his rent, and which he might at any time seize by virtue of his warrant. But in this case there is no such equitable consideration in Singerly's favor, inasmuch as he stands upon the same footing as other creditors of the firm and will share the proceeds with them. Judgment affirmed. *E. S. Miller, Esq.*, for plaintiff.

Second Judicial District.

Court of Common Pleas, Lancaster County.

GRAHAM vs. WALKER & Co.

An award of arbitrators that exceeds the sum claimed in the several counts of the narr, but is not greater than the amount of damages claimed, will not be disturbed. The Court of Common Pleas has no power to reform, remodel, or alter an award of arbitrators which has become an absolute judgment of record.

Rule to show cause why the award should not be reformed so as to conform to the amount laid in the narr, and the actual claim of plaintiff. Opinion delivered *January 17, 1874*, by

LIVINGSTON, P. J.—Harrison Graham, on October 12, 1871, brought an action of assumpsit against Asahel C. Walker and Samuel Walker, lately trading and doing business as Walker & Co., to November Term, 1871, No. 15. The summons was served October 16, 1871.

The narr filed October 12, 1871, contains the common counts, alleging that defendants were indebted to plaintiff in the sum of \$200 for money loaned; in the further sum of \$200 for money laid out and expended; in the further sum of \$200 for money had and received; in the further sum of \$200 for goods sold and delivered; in the further sum of \$200 for work and labor done; in the further sum of \$200 for money due on an account stated between them, etc. Alleging, also, the *non-payment of said several sums, or any of them, a refusal to pay, and that plaintiff has suffered damage to the amount of \$400, and, therefore, he brings suit, etc. On December 23, 1871, defendants plead, "non assumpsit." The cause was then referred to arbitrators, who, on November 8, 1872, filed an award in favor of plaintiff for \$354.20, after having (as they report), heard the parties, their proofs, and allegations. On November 29, 1872, defendants entered an appeal, and gave the prothonotary a draft in payment of costs. Plaintiff then claimed a rule to show cause why the appeal should not be stricken off, because of the draft being given, and this rule, upon argument, was made absolute. A writ of error was then taken to the Supreme Court, and the order of this court striking off the appeal was affirmed.

We are now asked to reform or remodel the award of arbitrators, which has become an absolute judgment, and make it \$200 instead of \$354.20, because, as is now alleged, the amount of the award is greater than plaintiff's claim, and greater than the amount declared for.

This rule must be discharged, for two reasons:

First. Because the amount of the award is not greater than the amount of damages claimed in the narr, as was the case in *Trego vs. Lewis*, 8 Smith, 463. The amount of damages laid in the narr is \$400, and the arbitrators, after hearing and passing upon the proofs and allegations of the parties, awarded plaintiff \$354.20. A num-

[*Original Edition. n. 56.]

ber of witnesses have been examined since the above rule was taken and entered, and their depositions read to the court upon the argument. The defendants, while they and their witnesses swear that plaintiff was at one time willing to accept \$80 or thereabouts, as a full settlement of his claim against them, do not state the amount of the claim he had against them for the timber they took, according to their account, nor the sum they really owed him. They merely state what he was willing to accept by way of settlement. While the plaintiff swears that he never offered to accept \$80 as a settlement; that his claim was for about 18,000 feet of timber taken by defendants without his permission, for which he had asked them \$22 per 1000 feet, and they had offered him \$20 per 1000 feet, and that he did at one time, to avoid a lawsuit, offer to take \$100 for his claim. Dr. Martin also swears that the value of the timber was \$22 per 1000 feet, so that the only testimony before us, with reference to the actual amount of the claim, shows it to have been about equal to the sum awarded by the arbitrators to the plaintiff.

Second. Because, when the award of arbitrators was returned to the prothonotary, entered upon the docket, and suffered to become an absolute judgment, the Court of Common Pleas has no power to reform, remodel, or alter it, even if it be illegal on its face, nor to change its amount.

The award of arbitrators, as returned to the prothonotary, and by him entered upon the docket, must be permitted to stand as entered.

—*Swift, Esq.*, for plaintiff. *S. H. Reynolds, Esq.*, for defendant.

**Twenty-first Judicial District.*

Court of Common Pleas, Schuylkill County.

THOMPSON, Assignee, vs. GLENN *et al.*

M. sold and conveyed certain premises, then under lease to G. and S., to T., and subsequently for the purpose of delivering possession (as shown by the record), gave notice to the tenants to quit. Held, that the lessor had not parted with her entire interest by such sale, but retained possession, which was sufficient interest to entitle her to give the necessary notice to quit.

Certiorari. Opinion delivered *February 15, 1874*, by

GREEN, J.—This is a proceeding to obtain possession of demised property under the landlord and tenant act of 1863. The defendants have removed the proceedings by *certiorari* into this court, and a number of exceptions have been filed and argued.

The first exception sets forth that the demise was from E. A. Miller to James Glenn and Charles A. Glenn, and that the notice to quit was not so directed, but to James Glenn & Son, and was served only on James Glenn.

But it is not alleged that Charles A. Glenn is not the son of James Glenn. Further, the record shows that they were joint tenants. Being joint tenants, a notice to one was a notice to the other, and a service upon James Glenn was service upon Charles A. Glenn: *Macartney vs. Crick*, 5 Epy, 196.

It is to be noticed that the proceedings under this act are to re-

[*Original Edition, p. 57.]

ceive the same liberal construction as under the act of 1772, and that there is always a reasonable presumption in favor of their regularity and correctness: *Snyder vs. Carfrey*, 4 P. F. Smith, 90; *Heritage vs. Wilfong*, 8 P. F. Smith, 137.

The second exception sets forth that there was no demise to James Glenn & Son, as stated in the notice. This exception must fall with the first. It is not claimed that Charles A. Glenn is not the son of James Glenn, and the party indicated in the notice. We cannot think that there is such a fatal variance between the parties named in the lease and in the notice, as to be fatal to their proceedings.

The next two exceptions raise a more serious question. They set forth substantially that the record shows that E. A. Miller had parted with her interest in the property in September, 1872, and that therefore she had no right in December following to give any notice to quit in April, and that Thompson, the assignee and owner, cannot claim the benefit of the notice, because the act was authorized by him and was not done for him or in his name.

*If the record showed that E. A. Miller had parted with her entire interest in the demised premises in September, 1872, so that she no longer had any title or possession or right of possession, then I think that a notice by her, on the 31st of December following, to quit the premises, would be a nullity and of no more validity than if it had been given by an entire stranger. It is true that the wording of the act of 1863 make the lessor, his agents, or attorney, the only proper party to give the notice. But it also makes them the only parties who can institute proceedings to recover possession, and the lessor the only person in whose favor the justice could give judgment of restitution and for damages. According to its wording no one but the original lessor could take the benefit of the act. But by judicial decision that act has been held to authorize the assignee of the lessor to give the notice and institute proceedings, and by a supplement to the act, passed 20th of February, 1867, it was expressly made to apply to cases in which the owner of the demised premises has acquired title, either by descent or purchase, from the original lessor.

The act being thus enlarged in its scope by the amendment and by judicial construction, I cannot think that it also enlarged the power or right of the lessor to give notice, where the property had passed out of his hands into that of an assignee. He would still be confined to the notice which the act of 1863 authorized him to give, that is in cases where he is the proper party to institute the proceedings, and the proper party to have judgments of restitution of the premises. This I think would be a reasonable construction of the law. We would naturally suppose that a notice to quit by a person who had ceased to have any interest whatever in the property demised, would be at best a piece of presumption, and that a tenant would not be bound to pay any attention to it. It would constitute a valid defence against the suit of a lessor seeking to recover possession, that his title to the premises has been transferred since the date of the demise: *Heritage vs. Wilfong*, 8 P. F. Smith,

[*Original Edition, p. 58.]

137. Under the landlord and tenant act of 1872, the proviso gives to the tenant the right of setting up this as a defence against his lessor. And by the supplement, passed in 1867, we think the act of 1863 is assimilated in many of its features to the act of 1772. For these reasons I think that notice by a lessor who has parted with all his interest in the demised premises is of no validity whatever. It is but proper, however, for me to say that these are my individual views, and not to be taken as the opinion of the court, for the reason that my brother, Walker, who sat with me at the argument, is of opinion that a notice by the lessor would be sufficient, being embraced within the letter of the law.

But does the record show that the lessor had parted with her entire interest in the property? True, it sets forth a deed of conveyance made and executed on the 24th of September, 1872, and that she did grant, *bargain and sell to the said Thompson. If nothing else appeared, this would be conclusive that all her interest had passed away, and that she had become a stranger to the property. But a further examination of the record shows also that for the purpose of delivering possession of this property from herself to Thompson, that she gave the notice to the tenants to quit. The complaint of the assignee sets forth this fact, and the finding of the justice also sets it forth. This being the case, a strong inference arises that the possession of this property still remained in the lessor, to be ended only by the ejection of the tenant and the delivery of actual possession to Thompson, and that the relation of landlord and tenant had not ended on the 31st of December, 1872, when the notice was given. And the fact that the deed was made and executed on the 24th of September previous, is not necessarily inconsistent with this state of facts.

By agreement between the parties, the lessor may still have retained such an interest in the property as would make a notice from her good and valid. If it was part of the agreement between these parties that possession was to remain in the lessor, and that for the purpose of delivering possession to Thompson, the notice was given to quit, and a fair inference arises that such was the fact, then I am of opinion that the lessor was entitled to give the notice, and that the assignee may avail himself of its benefits. It must be remembered that there is always a presumption in favor of the regularity and correctness of such proceedings: *Heritage vs. Wilfong*, 8 P. F. Smith, 137. Aided by this presumption, I think the record fairly shows that Mrs. Miller still retained sufficient interest in the property after the date of her deed of conveyance, to entitle her to give the necessary notice to quit. This disposes of all the exceptions which have been pressed, and whether the opinion is entertained that the lessor is, under all circumstances, as a proper party to give the notice, or whether the record shows an interest still remaining in her, sufficient to give it, the result we arrive at is the same, and the proceedings must be sustained.

Proceedings affirmed.

First Judicial District.
Court of Common Pleas, Philadelphia.

DAVIS vs. SOUDER.

A license to take away soil, sand, etc., and the guarantee having expended money on the faith of it, cannot be revoked.

In equity. Motion to continue special injunction. Opinion delivered *February 7, 1874*, by

PAXSON, J.—We do not attach much importance to the denial of plaintiff's title contained in the defendant's answer. It is not disputed that the plaintiff has the full equitable title to the seventeen lots in *question, and that the legal title is now in course of preparation. This is sufficient to give him a standing in a court of equity.

The defendant justifies his taking of the "soil, earth, gravel, sand and stone," from the said lots, under a license from the Fairhill Land Company, at that time the owner of said lots, and now the vendor of plaintiff. Said license bears date the 31st of March, 1873; is signed by Louis Wagner, as chairman of the committee on streets of the Fairhill Land Company, and authorized the plaintiff to "remove the surplus earth from the lots of the Fairhill Land Company, for the purpose of filling up Fifth street, and for no other purpose," etc.

The plaintiff contends that this is a mere license, without consideration; that it is revocable at the pleasure of the Fairhill Land Company, or by the plaintiff as the grantee of said company.

The general rule undoubtedly is, that a mere license may be revoked. There are exceptions, however, to this rule. One of those exceptions is, where the person to whom the license is given, makes substantial improvements and expends money on the faith of such license, and with the knowledge of the person granting it. In such cases it has always been held that it would be inequitable to revoke it. "A license may become an agreement on a valuable consideration, as when the enjoyment of it must necessarily be preceded by the expenditure of money, and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration;" *Rereck vs. Kern*, 14 S. & R. 267. In this case the defendant, at the time, contemplating entering into a contract with the city of Philadelphia, at a certain fixed price, to grade Fifth street, from Clearfield to Westmoreland street, proposed to the Fairhill Land Company to remove the surplus earth from certain of the lots of said company, and use the same in grading or filling up Fifth street, and the neighborhood of the said lots. He alleges that he would not have taken the contract at the price named therein, without the privilege of removing the earth aforesaid; that having obtained said license from the land company, he entered into said contract; has expended \$1,500 in the purchase and employment of horses, carts, etc.; and that if said license should be revoked it would subject him to a heavy loss.

[*Original Edition, p. 60.]

Practically, the removal of the earth will add to the value of the lots, as it reduces them to the city grade. The plaintiff alleges, however, that a large portion of the substance to be removed is gravel, and worth much more than the costs of removing it; that the land company acted improvidently, and not with a proper regard to the interests of its stockholders when it gave this license.

If this be so it is no concern of this defendant. He was authorized to do what was, in one view, at least, a benefit to the company. On the faith of it, and with the knowledge of the company that he intended to do so, he entered into a contract with the city for filling up Fifth street, and made a large expenditure in the purchase of horses, carts, etc. It would be against equity and good conscience to allow the land company now to revoke this license.

It was urged that the expenditure made by the defendant had not been upon the lots in question. While this is true in point of fact, I do not see the force of the objection. In many of the cases cited by the learned counsel for the plaintiff there had been expenditures upon the land charged with the license, as in boring for oil or sinking shafts for coal and other minerals. Yet none of the cases rest upon the ground that the expenditures had been made upon the land. The principle is, that having induced or permitted the party to expend his money upon the faith of the license, it would be inequitable to revoke the license and thus deprive him of the fruits of his expenditure. No better illustration of this can be found than in the leading case of *Rerick vs. Kern*, before cited, where the plaintiff had erected a mill upon his own land upon the faith of a parol license to use the water from the defendant's property.

It was urged upon the argument that if the Fairhill Land Company cannot revoke the license, the plaintiff, as its vendee, may do so. This proposition assumes that the plaintiff is a *bona fide* purchaser without notice, whereas the fact is undisputed in this case that he is a stockholder in the said company, was one of the board of directors at the time this license was granted and had actual personal knowledge thereof. He was part owner of these lots at the time of the grant in the sense in which a stockholder of a corporation may be said to be interested in its real estate.

The equities of the case are all against the plaintiff, and his motion to continue the special injunction is denied.

Eastern District.

Supreme Court of Pennsylvania.

CONAWINGO PETROLEUM REFINING CO. vs. CUNNINGHAM.

A contract for the sale of oil to be called for any time from date to December 31 gives the buyer the option to call for it on that day.

Error to the District Court of Philadelphia. Opinion delivered January 26, 1874, by

AGNEW, C.-J.—The contract in this case was for the sale of "one
[*Original Edition, p. 61.]

thousand barrels good green merchantable crude petroleum, forty gallons to the barrel, gravity forty to forty-six degrees, at a temperature of sixty degrees Fahrenheit, to be delivered, buyer's option, at any time from this date to December 31, 1870, in bulk cars," etc. Does this expression to December 31, 1870, include the thirty-first day? This question cannot be *decided by cases which interpret dubious expressions in laws or rules of court in order to preserve rights or fulfil special purposes. What we are concerned here with is in ascertaining the meaning of the parties in this particular contract. The preposition to is properly applicable to place or position, while till or until properly applies to time. Yet to is in common parlance and sometimes in legal phraseology applied to time. It has also various significations, indicating toward, to and into. In regard to time it often indicates a coming or passing into a day as well as arrival at it. Thus it is said, "the court adjourned from the 30th to the 31st of December," or "from the 1st to the 31st," or "from day to day." Now, in each instance, we understand that the court will reassemble on the last day. Whenever the expression is from day to day, or from one day to another, we always understand the second day to be included. Again, one says, "I have to the 31st to do a thing," or the other says, "You shall have to the 31st to do it." No one doubts the party can do the thing on the 31st. Such is the time designated for performance. Another expression to be found in this contract affords an illustration, to wit, "gravity from forty to forty-six degrees." It cannot be doubted if the oil be of a gravity of either forty or forty-six degrees it would fill the contract. Let us expand the language of this writing somewhat. The words of it are—"to be delivered, buyer's option, at any time from this date to December 31, 1870." Then read it thus, the seller saying: "I will deliver to you one thousand barrels of oil at any time from this date to December 31, 1870, at your option." Can it be doubted that when the seller says, "I will deliver at your option," the buyer may call for the delivery of the oil on the 31st and the seller would be bound to deliver then. The parties did not refer themselves to "decided cases," but had their own meaning, which was that the limit should be the 31st day of December, that the last day of performance. The selection of the last day of the month, and of the year, has some influence in fixing that as the last day of performance, as if the parties had said, "all the month of December, or all this year." January 1 begins a new period. The time is necessarily mutual, so that if the buyer may demand on the 31st the seller may deliver on the 31st.

The fact that a subsequent contract adds the word "inclusive" after the 31st of December does not interpret the prior contract which is without the word "inclusive." The earlier contract must stand on its own language. The insertion of the word in the second contract may have been due to greater precision or greater precaution to prevent misconstruction and yet they may mean the same thing. It does not follow because the latter is expressly "inclusive," the former meant to be "exclusive." We therefore interpret the language as we think the parties intended, to wit, that the

[* *Original Edition*, p. 62.]

buyer could call for the oil in the year 1870, and before the 1st of January, 1871; the word "to" having no precise and definite significations to require exclusion of the last day by reason of its *plain grammatical meaning. The case of *Cleveland vs. Sterrett*, 20 P. F. Smith, 204, was decided in the same spirit of liberal interpretation to reach the evident intent of the parties.

The judgment of the court below is reversed, and judgment is now entered for the plaintiff on the case stated for the sum of fourteen hundred dollars, with interest from July 12, 1873.

Twenty-sixth Judicial District.

Court of Common Pleas, Wyoming County.

LUTES vs. THOMPSON.

1. The giving of a judgment note by a minor is void.
2. That the retaining of the property for which the judgment note was given, after the minor became of age, does not ratify the contract and make the note valid.
3. The court in this and similar cases have the right to strike off judgment.

Rule to show cause why judgment shall not be stricken off on the ground that the defendant was a minor when he gave the note. Opinion delivered *January 31, 1874*, by

ELWELL, P. J.—Was the confession of judgment by the defendant in his note of January 27, 1873, absolutely void at the time he made it? That he was then an infant is admitted by the plaintiff in the depositions filed of record and by his counsel on the argument. In *Knox vs. Fleck*, 10 Harris, 337, it is held that authority in a note signed by an infant to a prothonotary to enter judgment is void, just as the warrant of attorney of a married woman is void.

The bond or warrant of attorney of a married woman is absolutely void; *Dorrance vs. Scott*, 3 Whart. 309; *Caldwell vs. Walters*, 6 Harris, 79; *Glyde vs. Reisler*, 8 Casey, 87.

That is absolutely void which the law or nature of things forbids to be enforced, and that is relatively void which the law condemns as a wrong to individuals and refuses to enforce against them, per Lowrie, J., 8 Wright, 9. Contracts of married women belong to the class which are absolutely void.

The term voidable is now the usual predicate of contracts by infants. In the note to 1 Parsons' Cont. 244 it is stated that recent authorities incline to hold all (or all with a single exception) an infant's contracts to be voidable and not void. See also *Id.*, p. 276, in note.

What that single exception is the author does not state, but from the examination of the authorities it would appear to be the making of a power of attorney, specially of a power to confess judgment.

*The Supreme Court of Maine, in the case of *Robinson vs. Weeks* (see 8 Am. Law Register, 557) held that the contracts of minors may be divided into three classes.

1. Binding for necessities at fair and just rates.

[* *Original Edition*, pp. 63 and 64.]

2. Void if manifestly and necessarily prejudicial, as of suretyship, gift, naked release, appointment of agents, confession of judgment, or the like.

3. Voidable at the election of the minor, either during his minority or within a reasonable time after he became of age.

A confession of judgment is necessarily prejudicial to a minor in making defence against his contract for the reason that in order to be allowed to make his defence of infancy, at the time of entering into the contract, he is obliged to apply to the court to permit him to make his defence and for that purpose to open the judgment. This application being addressed to the discretion of the court, may be refused if the confession were to be held voidable only and not void, he would be bound by an act done at a time when he had no legal capacity to perform it.

But it is claimed that by retaining the property purchased after he became of age the defendant ratified the whole of the contract including the confession of judgment. To the argument on this position there is a complete answer. If the power to enter the judgment was void, it was incapable of ratification, that it is void, is in accordance with the doctrine of every court, English and American, to which a similar question has been presented.

Whether the reasons for the rule are satisfactory or not, the rule itself is established by a conclusive weight of authority: 1 Am. Leading Cases, 106, in note.

That the court has authority and that it is its duty to strike off a judgment entered upon a confession of judgment or warrant of attorney is clearly settled by the cases of *Hutchinson vs. Leslie*, 12 Casey, 112, and *Knox vs. Fleck*, *supra*.

Rule made absolute.

**Second Judicial District.*

Court of Common Pleas, Lancaster County.

SEIBER vs. LANCASTER AND READING NARROW GAUGE RAILROAD CO.

The draft required to be filed upon presentation of petition, asking for the appointment of viewers to assess damages occasioned by the running of a railroad, is within the costs and expenses to be paid by the railroad company, especially when the filing of the same is requested by the company.

Exceptions to costs. Opinion delivered *January 17, 1874*, by

LIVINGSTON, P. J.—The act of assembly of February 19, 1849, under which the question in this case arises, § 11, among other things, declares that the viewers appointed to assess damages “shall estimate and determine whether any, and if any, what amount of damages has been or may be sustained, and to whom payable, and make report thereof to the court; and if any damages be awarded, and the report be confirmed by the court, judgment shall be entered thereon, and if the amount thereof be not paid within thirty days after the entry of such judgment, execution may then issue thereon, as in other cases of debt, for the sum so awarded, and the costs and

[*Original Edition, p. 65.]

expenses incurred shall be defrayed by the said railroad company."

The viewers in the case before us awarded the petitioner one hundred and fifty dollars damages, which, together with all the costs and expenses incurred (except six dollars), have been paid by the railroad company.

The six dollars excepted to is the cost and expense of making a survey and preparing a draft of complainant's premises injured by the company.

The act of assembly makes no provision for filing a draft or other instrument, defining precisely the quantity of land appropriated by the company in any case of record in the proceedings with reference to assessment of railroad damages. The Supreme Court say, this is owing to defective legislation, and, in the absence of legislation, they see no way of reaching it, unless by prescribing such rules, or making an order, under the general powers conferred by law on the court, which will bring the act of the company, evidencing its appropriation, into the record, and enable the court to send before the viewers the true and only questions they ought to decide.

When this petition was presented to the court, counsel for the railroad company objected to the appointment of viewers to assess the damages until petitioner filed a draft of the property owned by him, and alleged to have been injured by the railroad company, and upon their objection, and at their request the court ordered the petitioner to file a draft within a specified time. The draft was made and filed. Viewers were then appointed and the damages assessed.

*After having required the draft defining precisely the quantity of land appropriated by the company to be prepared and filed, we are of opinion that the law, which directs that the railroad company shall pay all the damages, costs, and expenses, requires them to pay for it.

The exceptions are, therefore, dismissed.

Eleventh Judicial District.

Court of Common Pleas, Luzerne County.

DEVERS vs. GETTING.

1. The jurisdiction of the Common Pleas of actions of trover and trespass is not taken away, qualified, or restricted by the act of 1814, which gives to justices of the peace jurisdiction of such actions.
2. The act of 1814, giving to justices of the peace jurisdiction of trover and trespass, contains no restriction like the 26th section of the justices' act of 1810, imposing costs on a plaintiff who sues in the Common Pleas on a demand for less than \$100. It is not required in actions of trover or trespass in the Common Pleas that the plaintiff, in order to recover costs, file an affidavit that his demand or claim exceeds \$100.
3. Plaintiff in such actions brought in the Common Pleas, even though he recover less than \$100, is entitled to have judgment entered with costs.

Rule to show cause why judgment shall not be entered without costs. Opinion by

DANA, J.—The plaintiff brought an action of trover and conversion.
 [*Original Edition, p. 66.]

sion in the Court of Common Pleas. The damages laid in his declaration and the amount actually recovered, are less than one hundred dollars. The act of 22d March, 1814, P. D. 867, § 119, gives to justices of the peace and aldermen jurisdiction of actions of trover and conversion in all cases where the value of the property claimed or damages sustained shall not exceed one hundred dollars. The jurisdiction of the Court of Common Pleas is not taken away by this act, nor does it contain any provision analogous to the 26th section of the act of 1810, P. D. 848, § 31, imposing costs on a plaintiff who sues in the Common Pleas for debt or demand of less than one hundred dollars, made cognizable before a justice of the peace. The case of *Clark vs. McKisson*, 6 S. & R. 87, determines that the restriction on the exercise of jurisdiction by the courts of common law, which is provided by the act of 1810 for cases within its purview, does not exist in trespass, trover, and conversion under the act of 1814. Justices have concurrent jurisdiction with the Common Pleas under the latter act, in actions of trover and trespass, and this act does not require an affidavit that the claim exceeds one hundred dollars, in order to recover costs: *Moyer vs. Illig*, 2 P. F. Sm. 444.

It is true that in *Clark vs. McKisson* and *Moyer vs. Illig*, the plaintiff's demand, as laid in the declaration, exceeded one hundred dollars, but that would not have made the slightest difference if the provisions of the 26th section of the one hundred dollar law had been deemed applicable to cases of trespass or trover, because by that section the sum recovered determines whether the plaintiff shall gain or lose costs, unless he has *taken the precaution to make a previous affidavit, or unless his demand is reduced by set-off: *Richards vs. Gage*, 1 Ash. 192.

It follows, under the authorities, that the jurisdiction of the Common Pleas in trespass or trover is neither qualified nor restricted by the act of 1814; that the restrictive clause contained in the justices' act of 1810 does not exist in the act of 1814, giving to justices jurisdiction in actions of trover and trespass, and that the plaintiff is, therefore, entitled to have his judgment entered with costs.

The rule is discharged.

Supreme Court of Pennsylvania.

GREENOUGH vs. THE FULTON COAL CO. *et al.*

Courts are not required to refrain from expressions of opinion upon subjects of contest before it, nor is it error when a court clearly puts the case to the jury on its true question.

By virtue of the act of 12th April, 1842, commissioners' books are evidence of assessment without other evidence of action on the part of township assessors.

Fixing a rate is not charging the land with a tax, though the rate is essential to the charge.

Error to the Court of Common Pleas of Northumberland County. Opinion delivered February 9, 1874, by

AGNEW, C. J.—If we read together the entire charge in this case, including the answers to the points, we find it not contradictory or

[*Original Edition, p. 67.]

erroneous. In the main, it was a fair exposition of the law applicable to the facts. The statement that the valuations are to be made and returned by the township assessors, and that these returns, with their valuations, and the rates affixed, constitute a legal assessment, was made in answer to a point, and repeated in the charge evidently in consequence of a contest upon the question, what constitutes a true assessment? It cannot be expected that the court shall refrain from any expression of opinion upon subjects of contest before it, nor is it error when the court clearly puts the case to the jury on its true question. The following cases show that the court did not mistake the character of a regular assessment: *Walls vs. Smyth*, 5 P. F. Smith, 159, where the cases are collected; *Lyman vs. City of Philadelphia*, 6 P. F. Smith, 501; *McReynolds vs. Longenberger*, 7 P. F. Smith, 13. But the court did not charge that the plaintiff was bound to prove such an assessment in order to support a rate for taxes; and, on the contrary, referring to the act of 12th April, 1842, making all the records of the county commissioners charging lands as unseated with arrears of taxes evidence of assessment, the judge expressly instructed the jury that there was evidence of an assessment upon the tracts of land mentioned and described in the commissioners' books, and that those books were evidence of an assessment, by virtue of the act, without other evidence of action on the part of township assessors. The same instruction is conveyed in the answers to the third and fourth points, and is repeated and enlarged upon in the last part of the charge. It is in vain to contend that the jury *must have been constrained by the definition of a regular assessment to consider it as binding on them in their finding. They were clearly and often informed that under the act of 1842, the commissioners' book containing the charges against this body of lands, and for which they were sold, was sufficient to support the sale. The judge took fairly the distinction, arising upon the act of 1842, which is taken by our brother Sharswood in the case of *Hess vs. Herrington*, 30 Legal Intell. 241, holding that when such evidence exists, the irregularity in the actual assessment, if any, is aided by the fourth section of the act of 13th March, 1815, declaring that "no alleged irregularity in the assessment or in the process, or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal." There was but one particular in which the judge deemed the book deficient, and this he properly submitted to the jury, to wit: the time when the assessment in the commissioners' book was made. There was no evidence whatever on the face of the book of the precise time of making the assessment or of making the entry in the book, and none appeared in the minutes of the commissioners. The fact was, therefore, necessarily submitted to the jury on the evidence, and with the distinct instruction of the court, that presumptively the assessment was made in the year 1864, a presumption most favorable to the plaintiff; otherwise the evidence itself left the jury pretty much at sea, without star or compass.

The plaintiff contends that this entry in the minutes of February 3, 1864,—“the board of commissioners agree to fix the rate of county

[* *Original Edition*, p. 68.]

tax at two mills on the dollar, the same as 1863," determines the time of the assessment. But this entry does not stand alone, and is followed by subsequent entries on the minutes, tending to show that the assessment was not complete on the third of February, 1864, and that the sum stated was only the intended rate for all county taxes, on seated as well as unseated lands. The entry on the minutes, March 25, 1864, that a full board of commissioners met and signed the assessment books, shows that the general assessment was not then complete. "Books" here is in the plural, and evidently refers to the assessment books for the several townships, commonly called duplicates, which is strengthened by the entry on the 20th of April following that "the board of commissioners fix the rate of county tax at two mills on the dollar for the year 1864." This minute of the final fixing of the rate wears a final aspect not belonging to the minute of 3d February preceding, which looks more like a prospective intent. It seems to be very evident that the general assessment of county tax for all purposes was not complete until at least the 20th of April, 1864, while as to the unseated lands there is strong evidence of incompleteness even then. This uncertainty of time makes it evident that the subsequent minutes of November 20, 1865, November 30, 1865, and December 13, 1865, were not irrelevant. Taking them in connection with the mode of keeping the commissioners' book by biennial periods, it looks very much as if the *commissioners of Northumberland county were very irregular in their mode of dealing with the unseated lands, and as if they thought it quite sufficient to have the unseated land list completed in time for the treasurer to advertise the list for sale every second year. Undoubtedly they had no authority thus to link together the years 1864 and 1865, and to change the rate for 1864, after they had duly assessed the unseated lands for that year; but such being their irregular action, we cannot say that the court erred in receiving these minutes as evidence upon the question of fact, when they actually completed the assessment for 1864. It cannot be truly said that these entries on the minutes throw no light on the question of fact, and, therefore, we cannot pronounce them so irrelevant as to make their admission erroneous. The time of the actual and final assessment was important to the defendants' case, for, if the land was seated, as the evidence tends to show, early in March, 1864, before final assessment, or if the assessment was, in point of fact, not made until within a year before the time of sale, the treasurer's sale conveyed no title.

The argument is fallacious that the rate of February 3, 1864, assuming it to be the fixed determination of the rate, is to be referred to the preceding triennial assessment in 1862, and thus to constitute a complete assessment in 1864. Fixing a rate is not charging the land with a tax, though the rate is essential to the charge. The property to be taxed in the unseated list must be ascertained and individuated before it can become the subject of a charge. While the triennial assessment is the basis of the subsequent annual assessment, and the valuation then fixed will remain, unless changed by reason of alterations in the property, it does not

[*Original Edition, p. 69.]

per se constitute the annual assessment of the property with taxes. The charging of lands with taxes is an annual process, for the reason that neither the property itself, nor its ownership, necessarily continues for triennial periods. The commissioners would have no right to reject the annual returns, and, falling back upon the last triennial return, make their charges upon it. The six tracts, the subject of the return in 1862, in one body might have been disconnected by sales or changed by improvements; part might under different owners become seated and not subject to sale, leaving others unseated and liable to be charged as unseated. Of necessity the charging of the lands as unseated for any year must be the act of that year, having relation to individual properties as then existing, and cannot be made good by reference to the state of the property in the preceding triennial period. It is true in this case the property remained without change, but this did not affect the duty of the commissioners to charge it specially with the taxes of 1864. We are, therefore, brought back to the commissioners' book and the assessment of 1864 contained in it as the only evidence of the assessment for that year, and as there was nothing in it to exhibit the time of the assessment, there must be a resort to independent or outside facts to determine the true time. This brought in, necessarily, all the acts of the commissioners *found in the minutes of their proceedings relating to the unseated lands, which could throw any light on the main question, when did they complete their assessment of unseated lands for the year 1864?

These are the only questions we deem it necessary to notice, as their decision rules the case. The verdict of the jury on the facts is not the subject of our inquiry.

Judgment affirmed.

SAMUEL K. ASHTON vs. DANIEL M. DULL.

To render the endorser of a note liable, demand must be made of the maker, if at a bank or place of business, within usual business hours; if at his residence, at a reasonable time, and not at an hour when it may be presumed the family will be in bed, unless the maker or his agents are in the office when demand is made, though out of business hours.

Error to the District Court of Philadelphia. Opinion delivered February 16, 1874, by

GORDON, J.—In order to render the endorser of a promissory note liable upon the default of the maker it is necessary that demand be made of the maker, and this demand must be made at the proper time and proper place, otherwise the endorser is discharged.

Where a note is payable at a bank, demand must be made within the usual business hours; when payable at an ordinary business house, it must be presented within the business hours which are usual and customary to such houses. Where it is payable at a private house, it should be demanded at a reasonable time and not so late in the day or so early in the morning that it may be presumed the family will be in bed. . . . The reason of these rules is obvious. We expect to find business men in their banks and

[* *Original Edition*, p. 70.]

offices only during business hours, and to make the demand at such places out of such hours would be a useless formality. So to make the presentation at a man's house at midnight is to make it when, from the nature of things, the maker is unprepared to pay, though he may have both the will and the means so to do. We apprehend, however, that this rule does not obtain when the maker, or those persons who usually transact his business, are in his office when demand is made, though out of business hours, as in the case cited in the foot note: Byles on Bills, 206, when a note was made payable at a bank, demand made out of business hours held good, the officers of the bank being there and the cashier answering that there were no funds to meet the note. It will be seen by the rehearsal of these legal rules that the affidavit of the defendant in this case was sufficient to give him a trial by jury. He swears that demand was not made of the maker of the note personally, nor at his usual place of business during his office hours, and that those hours were the same as those of similar offices in this city. This raises the question whether, if demand were made at all, it was made at a reasonable time, regard being had to the place. If made at his office at an hour when, from the general custom, it could not be expected that he or his clerks would be there, then clearly it could not avail to fix the endorser.

Judgment reversed and *procedendo* awarded.

*LONG vs. RHAWN.

When a note is taken after its maturity, it is taken subject to the equities existing between the original parties arising out of or connected with the note itself, such as its accommodation character, but not to a set-off.

Error to the District Court of Philadelphia. Opinion delivered February 9, 1874, by

MERCUR, J.—It is admitted that the note passed into the hands of the plaintiff below after its maturity. It was then, in the eye of the law, dishonored paper. It is true, the endorsee did not take it subject to set-off, but he did take it subject to the equities arising out of or connected with the note itself: *Hughes vs. Large*, 2 Barr, 108; *Downey vs. Sharp*, 13 P. F. Smith, 322.

The evidence showed that the payee was largely indebted to the makers of the note; that he had collected money for their use; that he was to pay the same over to Long, one of the makers; that when Long and Grant met at the office of the latter Long spoke of the unsettled balance between them and asked Grant if he could not let him have some of it—one thousand dollars; that then Grant gave Long a check for money, and Long gave Grant the note in question. It is claimed by the defendants below that for the purpose of paying them one thousand dollars Grant suggested that their note for that amount should be drawn payable to him and that he would endorse it and have it discounted at bank, and thus obtain for them the money; and he would take it up at maturity. That thereupon Long gave the note in question, and Grant gave

him the check for the same amount; that when the note matured it was taken up by Grant according to his agreement.

The learned judge below deemed the evidence insufficient to submit to the jury and directed their verdict to be rendered in favor of the plaintiff below. In this, we think, he erred. The facts proved, wholly unexplained by the plaintiff below, were sufficient to have been submitted to the jury to find whether the note was not given for the accommodation of Grant. It was given at an interview in which he admitted his indebtedness to the makers, and when he was asked for a payment of the sum for which the note was given. Thereupon the note was executed and delivered to him and he gave his check to Long for money. After the maturity of the note it was found in his hands and he then disposed of it to the plaintiff below. If the jury should find that the note was given under the circumstances claimed by the defendants below, and taken up by Grant when it matured, then the plaintiff below took it subject to all the equities which had attached to it while in the hands of Grant, and there was a good defence: *Bower vs. Hastings et al.*, 12 Casey, 185; *Wilson vs. Mechanics' Saving Bank*, 9 Wright, 488.

Judgment reversed and a *venire facias de novo* awarded.

**First Judicial District.*

Court of Common Pleas of Philadelphia.

WISTER vs. THE CITY.

The new constitution does not affect the taking of land under a special act passed before its adoption.

In equity. Opinion delivered February 7, 1874, by

PAXSON, J.—The points involved in this case have been before us so often that they are becoming familiar. We do not see wherein it differs from *Smedly vs. Irvin*, 1 P. F. S. 445, unless, as we alleged at the argument, it is affected by section 8, art. 16, of the new constitution, which provides, that "municipal and other corporations, and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking," etc.

It is unnecessary to discuss this clause of the constitution, for the reason that the act of 15th March, 1873, entitled "An act to open, grade, and pave Stiles street, from Broad street to Thirteenth street, in the Twentieth ward of the city of Philadelphia," was passed before the adoption of the present constitution, and the land of the complainant was taken by force and virtue of said act at the time of its passage.

The motion to continue the injunction is denied.

[*Original Edition, p. 72.]

HEYL vs. THE CITY.

A motion to dissolve an injunction will not be entertained until an answer be filed.

Opinion delivered *February 7, 1874*, by

PAXSON, J.—In this case the usual *ex parte* injunction was granted, and, after a hearing, continued, more than a year ago. On Tuesday last the cause was set down for argument upon a motion to dissolve. No answer has been put in, nor has any step been taken by the defendant since September 28, 1872, when the order continuing the special injunction was made. I declined to hear the motion to dissolve, and continued the cause until the next equity motion day, for the reason that such application could not properly be made until after answer filed. Subsequent reflection has satisfied me that in this I was right. It is true, some of the text books say, that a motion to dissolve may be made before answer; but this manifestly applies to *ex parte* injunctions, and not to cases where there has been a hearing. Otherwise we might be constantly employed in reviewing our own decisions. It is purely a question of practice, and the correct rule in such cases will be found in Adams' Equity, 196, 359.

If the defendants put in an answer on or before the next equity motion day, they will be in a position to move to dissolve the special injunction.

**Twenty-first Judicial District.*

Court of Common Pleas, Schuykill County.

KLOPP *et al.* vs. BREITENBACH.

The holding of an inquisition, under the 44th section of the act of the 16th June, 1836, is a judicial act, and must be performed by the sheriff himself. If held by a deputy it is invalid, though it may bind the sheriff.

Exceptions to the confirmation of the sheriff's inquisition. Opinion by

WALKER, J.—There are eight exceptions filed to the approval of the sheriff's inquisition in the above cases.

The only ones that are now material are the fourth and fifth, as to the legality of the inquest, upon the ground of its not being held by the sheriff, as required by the provisions of the 44th section of the act of 16th June, 1836. (Purdon's Dig. 646, pl. 55, P. L. 769.)

The depositions show that the inquisition was held by the deputy, in the absence of the sheriff, though the jurors had been previously summoned by the sheriff and sworn by him.

The act of assembly makes it the duty of the sheriff, whenever real estate shall be taken in execution, to summon an inquest for the purpose of ascertaining whether the rents and profits of such estate, beyond all reprises, will be sufficient to satisfy the judgment upon which such execution was issued within seven years, and he shall also make return in due form of law of the inquisition so taken, to the court, with the writ.

[*Original Edition, p. 73.]

If this be a judicial act, the sheriff must perform it himself, and he cannot depute another to do it.

In general, ministerial officers cannot appoint deputies: Roll Rep. 274; Comyer's Dig. "Office" D. 1, unless the office is to be exercised by the ministerial officer in person; and when the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be made for the performance of a judicial act. The sheriff, therefore, cannot make a deputy to hold an inquisition: Bouvier's Law Dictionary, 462, under head of "Deputy." A deputy cannot make a deputy, except to do a particular act: 1 Salk. 96.

The Supreme Court have decided, in *McMasters vs. Carothers*, 1 Barr, 324, that a deputy sheriff cannot deputize another to select and summon a jury of inquest, nor will the subsequent assent of the parties validate such act.

In *Ayres vs. Novinger*, 8 Barr, 412, they ruled that the sheriff, or his regular deputy alone can select a jury under the landlord and tenant act. This last case was overruled so far as relates to the power of the deputy, in the *Pennsylvania R. R. Co. vs. Heister*, 8 Barr, 445, where that court held that it was irregular for the sheriff to select a jury from a list of names prepared by his deputy.

*Judge Rogers says, on page 452 of that case: "On more mature reflection I am satisfied that none but the sheriff himself is competent to perform that duty. It is a judicial act, requiring judgment and discretion, which cannot be deputed to another." So a valid return can only be made by the sheriff himself: *Beale vs. Commth.*, 7 Watts, 183, per Gibson, C. J. Though, if allowed to stand, it binds the sheriff: *Andrews vs. Linton*, 1 Salk. 265.

To the same effect is *McMullin vs. Orr*, 8 Phila. Rep. 343, and of *Haberstroh vs. Toby*, 1 Legal Chronicle, 387, where Judge Harding decided that the holding of an inquisition is a judicial act and must be done by the sheriff. If the summoning of the inquest and the return of the writ be judicial in their nature (as have already been decided by the Supreme Court), a fair construction of the act of assembly would also make the holding of the inquisition a judicial act, for each act is only a part of one duty, and all are inseparably connected; and in holding the inquest for the purposes of the law, as much, if not more, judgment and discretion are required, as in summoning the jurors, or making return of the writ. There is no good reason why we should hold differently. No unfairness is attributed to the worthy and efficient deputy of the sheriff, but the practice is against the law and should be discontinued. It might become, under certain circumstances, a fruitful source of abuse, and, as Judge Rogers says, might "strike at the usefulness of one of our best institutions."

These exceptions are, therefore, sustained and the inquisition set aside.

Supreme Court of Pennsylvania.

SCOTT *et al.* vs. THE NATIONAL BANK OF CHESTER VALLEY.

The plaintiffs below, who kept an account with the defendant, made a special deposit of certain bonds for safe-keeping, paying nothing for the privilege; the bonds were stolen by the teller, who had always borne a good character.

Held, 1. That the bank was a gratuitous bailee, and as such not liable, except for gross negligence.

2. That neither the fact that the bank might have discovered that the teller was dishonest by a more frequent or accurate examination of his accounts, nor that he was allowed to keep the "individual ledger," which was the only book which was a check upon him, nor that he was not dismissed when it was discovered that he had made a successful speculation in stocks, was such negligence as to render the bank liable.

3. That nothing short of knowledge or reasonable grounds of suspicion by the bank, that the teller was unfit to be appointed or retained, would render it liable: *Foster vs. Essex Bank*, 17 Mass. 478, approved and followed: *Lancaster Bank vs. Smith*, 12 F. S. (62 Penna. Stat.) 47, remarked on.

Error to the Court of Common Pleas of Chester County. Opinion delivered February 16, 1874, by

AGNEW, C. J.—As early as the case of *Tompkins vs. Saltmarsh*, 14 S. & R. 275, it was decided that a delivery of a package of money to a gratuitous bailee, to be carried to a distant place and delivered to another for the benefit of the bailor, imposes no liability upon the bailee for its safe-keeping, except for gross negligence. In that case, the package was *stolen from the valise of the bailee, at an inn in the course of his journey, after it had been carried to his room, in the usual custom of inns in that day (1822). The same rule is laid down by Justice Coulter, *arguendo*, in *Lloyd vs. West Branch Bank*. He says, a mere depository, without any special undertaking, and without reward, is answerable for the loss of the goods only in case of gross negligence, which, in its effects on contracts, is equivalent to fraud. He further remarks, that the accommodation here was to the bailor, and to him alone, and he ought to be the loser, unless he in whom he confided, the bank or cashier, had been guilty of bad faith in exposing the goods to hazards to which they would not expose their own. These rules he derives from *Coggs vs. Bernard*, 2 Lord Raymond, 909; (1 Smith's Lead. Ca., part I, 369, ed. 1872;) and *Foster vs. Essex Bank*, 17 Mass. 501. In the latter case, the law of bailment was exhaustively discussed by Parker, C. J., and the conclusions were as above stated. It was further held that the degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the bailee uses towards his own property of a similar kind. When such care is exercised, the bailee is not answerable for a larceny of the goods, by the theft even of an officer of the bank. It is further said, that from such special bailments, even of money in packages, for safe-keeping, no consideration can be implied. The bank cannot use the deposits in its business; and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous, and for the benefit of the bailor, and no

[*Original Edition, p. 75.]

loss can be cast upon the bank for a larceny, unless there has been gross negligence in taking care of the deposit. These appear to be just conclusions, drawn from the nature of the bailment. The rule in this State is stated by Thompson, C. J., in *Lancaster Bank vs. Smith*, 12 P. F. Smith, 54. He says: "The case on hand was a voluntary bailment, or, more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence." That case went to the jury on the question of ordinary care, and hence the observation of the chief-justice, that the same idea was sufficiently expressed by the judge below in using the words, want of ordinary care. It may be proper, however, to say, that want of ordinary care is applicable to bailees with reward, when the loss arises from causes not within the duty imposed by the contract of safe-keeping, as from fire, theft, etc., and hence is not the measure in such a case as that before us, which we have seen is gross negligence.

That case was one where the teller of the bank delivered the deposited bonds to a stranger, calling himself by the name of the bailor, without taking sufficient care to be certain that he was delivering the package to the right person, and the bank was held responsible for his negligence. There the teller, in giving out the deposit, was acting in his official capacity, and hence the liability of the bank. The case before us now is *different, the bonds being stolen by the teller, who absconded. This teller was both clerk and teller; but the taking of the bonds was not an act pertaining to his business, as either clerk or teller. The bonds were left at the risk of the plaintiff, and never entered into the business of the bank. Being a bailment merely for safe-keeping, for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances, the only ground of liability must arise in a knowledge of the bank that the teller was an unfit person to be appointed, or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers would not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but a gross negligence in care-taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create. The question of the bank's knowledge of the character of the teller was fairly submitted to the jury.

But it turned out that after the teller absconded his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years, to an amount of about \$26,000.

[*Original Edition, p. 76.]

It was contended that the want of discovery of the state of his accounts for such a length of time, especially as he had charge of the individual ledger, was such evidence of negligence as made the bank liable.

The court negatived this position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor, whose loss arose not from the account as kept by him, but from a larceny, a transaction outside of his employment.

We perceive no error in this. The negligence constituting the ground of liability must be such as enters into cause of loss. But the false entries in the books, and the want of their discovery, was not the cause of the bailor's loss, and not connected with it. True the same person was guilty of both offences, but the acts were unconnected and independent.

True the bank did not discover in time the injury he did to it; but the very fact that it did not discover his false entries and his speculations repels the knowledge of his dishonesty. The neglect was culpable, and might have led to responsibility to those with whom they had dealings, if they suffered from that neglect. But this neglect to examine into his accounts was not the cause of the bailor's loss. His loss was owing to the immediate act of dishonesty of the teller, and not to his purloining the funds or falsifying the accounts of the bank. The argument of the plaintiff simply results in this; that mistaken confidence is a ground of liability. But if this were the case, business would stand still; for without a common degree of confidence in agents and officers, much of the business of the world must cease. The facts were fairly left to the jury, with the proper instructions.

Another complaint is, that the teller was suffered to remain in employment after it was known that he had dealt once or twice in stock. Undoubtedly the purchase or sale of stocks is not *ipso facto* the evidence of dishonesty; but as the judge well said, had he been found at the gaming table, or engaged in some fraudulent or dishonest practice, he should not be continued in a place of trust. So if the president of the bank, when he called on the brokers who acted for the teller in the purchase of stock, has discovered that he was engaged in stock gambling, or in buying and selling beyond his evident means, a different course would have been called for. No officer in a bank, engaged in stock gambling, can be safely trusted; and the evidence of this is found in the numerous defaulters, whose speculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer, having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on, and he ventures again to retrieve his loss or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step which ends in ruin to himself and to those whose confidence he has betrayed. Hence, any evidence of stock gambling, or dangerous outside operations, should be visited with immediate dismissal. In this case, the

[*Original Edition, p. 77.]

operations of the teller in stocks, as a gambler in them, was unknown to the officers of the bank until after he had absconded. Upon the whole, the case appears to have been properly tried, and finding no error in the record, the judgment is affirmed.

O'NEILL *et al.* vs. WILT.

A peremptory nonsuit on a sheriff's interpleader is such a determination of the issue as will operate to forfeit the bond if the goods are not forthcoming.

Error to the District Court of Philadelphia City and County. Opinion delivered *February 16, 1874*, by

AGNEW, C. J.—This was a sheriff's interpleader bond conditioned that the goods levied upon "shall be forthcoming upon the determination of the said issue to answer the said writ of execution, if the said issue shall be determined in favor of the said Charles Wilt." The sole question is, whether a peremptory nonsuit, under the act of 14th April, 1846, 2 Bright. Dig. 1169, pl. 26, because of the non-appearance of the plaintiff in the issue or his counsel, is such a determination of the issue as will operate to forfeit the bond, if the goods be not forthcoming. We perceive no good reason why it is not. The issue is for the protection of the sheriff, and to save litigation: *Bain vs. Murk*, 11 P. F. Smith, 185; *Bain vs. Lyle*, 18 P. F. Smith, 60. It should be under the power and superintendence of the court, just as other issues are, else it would be in the power of parties to delay or prevent the trial, in disregard of the interests of justice. Hence the plaintiff can be forced to trial or compelled to submit to a nonsuit; *Heinim vs. Hoiz*, 10 Casey, 896. The power of the court is not arbitrary, but one of sound discretion, to be exercised in view of the circumstances. If, therefore, the case be regularly on the trial list, and called for trial, and the plaintiff or his counsel do not appear, the court may, in the exercise of this discretion, order a nonsuit under the act of 1846.

Without this power the controversy about the right of property in the goods may be prolonged indefinitely to the prejudice of the execution creditor.

This brings us to consider the effect of the nonsuit. If it be no determination of the issue in favor of the execution creditor, a claimant, by repeated postponements, or by repeated renewals of the issue, may finally worry out the plaintiff in the writ by nonsuit after nonsuit. The claimant is entitled as of right to but one issue in the same case, and not to many. Hence if there be a nonsuit, he cannot be reinstated in his issue, unless by the grace of the court for cause. It would be injustice to suffer him to renew the contest *de novo* as often as he is nonsuited. The nonsuit therefore ends the particular issue, when not set aside by the court, and this necessarily determines the issue in favor of the execution creditor, so far, at least, that the sheriff may sell the goods, without liability to the claimant's action for a trespass in the seizure and sale. The claimant having had his day in court, and failing to prosecute his claims, is barred of his action against the officer, and is bound to return the

[*Original Edition, p. 78.]

goods or forfeit his bond. Whether his right of property is finally barred by such a nonsuit, it is not necessary we should now determine, the question not being before us. It is sufficient to say the bond is forfeited if the goods be not forthcoming; and in such event the surety is bound as well as the principal.

Perceiving no error in the record the judgment is affirmed.

First Judicial District.

Court of Common Pleas, Philadelphia.

CHRISTMAN vs. BAURICHTER.

After dissolution of a partnership and payment of its debts, if there is no special agreement, each partner should be repaid ratably his advances.

In equity. Exceptions to master's report. Opinion delivered February 21, 1874, by

FINLETTER, J.—The capital invested was \$2,900; of which the plaintiff furnished \$2,000, and the defendant \$900. The business was *unprofitable; and the assets are about \$1,400. The master distributed this sum in proportion to the capital advanced by each, and charged the costs equally.

The defendant excepts, 1st, because the assets should have been shared equally; and secondly, because all the costs should have been imposed upon the plaintiff.

Articles of partnership are not intended to define all the rights and duties of partner *inter se*. Much is left to be understood and determined by general principles, which are always applicable when not clearly excluded. They are to be construed so as to defeat fraud, and the taking of unfair advantages: Lindley on Partnership, pp. 841 and 843.

In the case before us the articles of agreement provided that "the profits shall be divided equally." "And in case of the dissolution of this co-partnership from whatever cause, the parties hereto agree to and with each other that they will make a true, just and final account, of all things relating to their said business, and in all things truly adjust the same. And after all the affairs of the co-partnership are adjusted and its debts paid off and discharged, then all the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in money, goods, wares, fixtures, debts, or otherwise, shall be divided between them."

It is clear there can be no division of assets until they shall have made "a true, just, and final account of all things relating to their said business, and in all things truly adjust the same." Not the least of the things relating to their said business are the accounts of the individual partners with the firm. They are some of the affairs of the co-partnership, the adjustment of which they have made necessary to a division of the assets.

There is no allegation that "equally" was omitted from the clause by fraud or mistake. We cannot interpolate it; for that

[* *Original Edition*, p. 79.]

would be adding to the written contract of the parties. There is no ambiguity in the language used; and as it stands we must apply the principles of construction. "Divided" means divided according to law.

Partnership arises from a contract to join in lawful business; and to divide the profits and losses. The controlling idea is a division of profits. The courts have always held that a partnership existed whenever the profits were divided, even though the parties may have agreed otherwise.

It nowhere appears that a division of assets enters into the definition of partnership. That, indeed, could only work a dissolution. This should be kept in view when we consider the language of judges and text-writers in reference to the "shares" of partners. That term in an active partnership could mean only division of profits or losses. In the settlement of the affairs after dissolution its meaning could not be enlarged. It could not, therefore, include the capital. That must be distributed upon other principles, or by special agreement.

Capital is the conjoined means of each partner, to be used for a specific purpose. Its component parts should be none the less the property *of the individual members when dissolution has occurred, because of the combination.

It may be considered well settled, that "when there is no evidence from which any satisfactory conclusion, as to what was agreed, can be drawn, the shares of the partners will be adjudged equal."

What follows from this? Equality in the thing is created; in its objects, in authority, and in the profit and loss. It does not imply equality in the component parts of that by which the agreement of the parties was made effective. When the fabric is useless for the purposes of its creation natural equity would suggest that to each would belong whatever he had contributed thereto. Any other rule would be a continuing temptation to him who had furnished the smaller part, to violate his duty as a partner, and thereby compel a dissolution.

Accordingly, we find in Lindley on Part., p. 696: "When it is said that the shares of partners are *prima facie* equal, although their capitals are unequal, what is meant is, that losses of capital, like other losses, must be shared equally; but it is not meant that, on final settlement of accounts, capitals, contributed unequally, are to be treated as an aggregate fund, which ought to be divided between the parties in equal shares."

When a partnership is created there are two distinct parties interested therein, first, the individual members, secondly, the conjoined members or firm. The firm represents the capital. It is therefore debited with the amount paid in by each partner. But there must be also an account for each of the members, in which he is credited with what he brings into the business, and debited with what he takes out of it. These accounts show how they stand in relation to the firm, and to each other. Upon a final settlement they must be balanced just as any other. This would effectually preclude the

[*Original Edition, p. 80.]

possibility of an unjust distribution of the assets of the partnership.

In stating an account between partners each should be credited with what he has brought into the enterprise, and debited with what he has taken out. If there is no evidence as to the amount contributed by them, the shares of the whole assets should be considered equal.

Upon dissolution, after the debts are paid, the advances should be first paid; and then each partner should be paid ratably what is due to him in respect of capital upon the settlement of the accounts of all the partners. If there should be a residue, it should be divided as profit in equal shares, unless otherwise agreed upon. The losses of capital, if not specifically provided for, must be borne equally. *Watson on Part.*, 285; *Lindley on Part.* pp. 623 and 827; *West vs. Skip*, 1 Ves., Sr., 242.

The master has been governed in his distribution, substantially, by these principles. The costs of the proceedings have arisen from a difference of opinion upon the articles in reference to a division of the assets. In this, no blame can be ascribed to either party, and, therefore, the costs were properly charged in equal portions.

The exceptions are dismissed.

*Supreme Court of Pennsylvania.

CRISBY vs. HESTONVILLE, MANTUA & FAIRMOUNT PASSENGER RAILWAY COMPANY.

As a general rule a question of negligence must be submitted to a jury. Where the measure of duty is ordinary and reasonable care, it is always a question for the jury. There is no absolute rule as to what constitutes negligence.

Where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Where negligence is concurrent a child will not be held to the exercise of the same degree of care and discretion as an adult.

It is the duty of a railway company to cause its cars to come to a full stop to permit a passenger to get off.

Error to the District Court of Philadelphia. Opinion delivered January 26, 1874, by

MERCUR, J.—The first assignment of error is not according to the rules. All the other assignments are to the charge of the court, and will be considered together. As a general rule, a question of negligence must be submitted to the jury. It should be where there is any substantial doubt as to the facts, or to the inferences to be drawn from them: *Pennsylvania Railroad Co. vs. Barnett*, 9 P. F. Smith, 250; *Johnson vs. Bruner*, 11 P. F. Smith, 58; *McKee vs. Bidwell*, 30 Legal Intelligencer, 393.

There is no absolute rule as to what constitutes negligence. It is dependent upon the particular circumstances of the case. Where the measure of duty is not unvarying; where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of its performance are to be

[*Original Edition, p. 81.]

ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved: *McCully vs. Clark et al.*, 4 Wright, 406; *Pennsylvania Canal Co. vs. Bently*, 16 P. F. Smith, 30. Where the measure of duty is ordinary and reasonable care, it is always a question for the jury: *Westchester & Philadelphia Railroad Co. vs. McElwee*, 19 P. F. Smith, 311. Where negligence is concurrent, a child will not be held to the exercise of the same degree of care and discretion as an adult: *Ranch vs. Lloyd et al.*, 7 Casey, 358; *Pennsylvania Railroad Co. vs. Kelly*, Idem, 372; *Smith vs. O'Conner*, 12 Wright, 218; *Oakland Railway Co. vs. Fielding*, Idem, 320; *Glassey vs. H. M. & F. Passenger Railroad Co.*, 172; *Key vs. Pennsylvania Railroad Co.*, 15 P. F. Smith, 269.

Now let us apply the law to the facts in this case. The plaintiff was a child of the age of thirteen years. He and his companion, a boy of the same age, signalled the driver as the defendant's car crossed Thirteenth street. The car was slackened to receive them; they stood there by the side of the driver all the way out to Forty-first street and Lancaster avenue. *No objection was made by either the driver or conductor to their riding there; neither of them requested the plaintiff to step inside of the car; the conductor came to him and collected his fare; at Forty-first street and Lancaster avenue, the plaintiff said to his companion in a voice sufficiently loud for the driver to hear, "I am going to get off here." The speed of the car was thereupon slackened; the plaintiff took hold of the dasher with one hand, and the iron on the car with the other, and stepped off; the car continued in motion; the plaintiff's foot slipped; he retained his hold to save himself: he was dragged two or three yards, and until the front wheel ran over his foot, causing the injury of which he complains. There was a crossing in the street where he desired to get off.

In view of the plaintiff's age, we think this evidence should have been submitted to the jury; the jury should have determined whether the plaintiff had been guilty of negligence; he should be held to the exercise of that degree of care and discretion ordinarily to be expected of a child of his age, neither more nor less: *Smith vs. O'Conner*, *supra*. So in regard to the defendant's alleged negligence. The fact that the plaintiff was suffered to stand upon and get off from the front platform, and whether the defendant exercised proper care under all the circumstances, in not sooner stopping the car, should have been submitted to the jury. It is the duty of a railway company to cause its cars to come to a full stop, to permit a passenger to get off. Whether the defendant properly discharged his duty with a due regard to the age of the plaintiff, and of the notice of plaintiff's desire to leave the car, should have been left to the jury. We think the learned judge erred in directing that the verdict should be for the defendant. The errors are sustained.

Judgment reversed, and a *venire facias de novo* awarded.

TAYLOR'S APPEAL.

The decedent executed an assignment, sealed it up in an envelope, and placed it in the fire-proof of the firm, of which he was a member. Upon the outside of the

[*Original Edition, p. 82.]

envelope, he wrote the name of the assignee, adding, "please send this to him on my death." After his death it was found in the fire-proof. Held, not to be a gift, or to create a trust in favor of the assignee, as there had been no delivery.

Appeal from the decree of the Orphans' Court of Philadelphia. Opinion delivered February 2, 1874, by

MERCUR, J.—The correctness of the decree made by the court below, depends upon the solution of two questions. They are:

1. Was there a gift executed? If not,
2. Was a valid trust created?

To constitute a gift, it must have been consummated by delivery. It cannot be made by words *in futuro*, or by words *in presenti* unaccompanied by such a delivery of the possession as makes the disposal of the thing irrevocable: *In re Campbell's Estate*, 7 Barr, 100; *Withers vs. Weaver*, 10 Barr, 391; *Kidder vs. Kidder et al.*, 9 Casey, 268; *Linsendigler vs. Gourley*, 6 P. F. Smith, 166; *Pringle vs. Pringle*, 9 P. F. Smith, 281. Where the donor retains the control of a voluntary bond or any chose in action given or assigned, he retains control over the gift, and may cancel or destroy it. The seal to a voluntary assignment will not estop the assignor until delivery, or what is equivalent to it: *Pringle vs. Pringle, supra*. Where the determining act remains *in fieri*, the intention to deliver does not execute the gift: *Crawford's Appeal*, 11 P. F. Smith, 52.

What is the evidence of a delivery of the assignment? After Trough had executed it, he placed it together with the policy in a sealed envelope. Upon the outside thereof, he wrote the name of the assignee, with his occupation and residence, adding, "please send this to him on my death," and signed his name thereto. He then put the envelope in a fire-proof safe of the firm, of which he was a member. After his death, which occurred more than seven years thereafter, the seal was broken and the assignment found. During all the interval between the assignment and his death, he continued to pay the premiums upon the policy.

During his life, neither the assignee nor the *cestui que trust* had any knowledge of the assignments. He kept it within his exclusive control. It did not pass out of his possession.

Placing it in the safe which belonged to the firm of which he was a member, did not deprive him of its possession. It is not shown that his partner ever saw the envelope prior to the death of Mr. Trough; nor, if he saw it, is there anything indicating he had knowledge of its contents. The direction on the envelope was to deliver after Trough's death. It clearly negatived all idea of a delivery prior to that event. He retained the exclusive dominion and control over it, with full power to revoke the request at his own will and pleasure. Hence, we are clearly of the opinion that there was no such delivery as to constitute a valid gift.

Then as to the trust. The assignment was not a contract that could be enforced. It lacked the consideration, necessary in the absence of a delivery, to support a contract or create a trust. Its sole consideration was natural love and affection. This is insufficient: *Kennedy's Executors vs. Warr*, 1 Barr, 445; *In re Campbell's Estate*,

[* Original Edition, p. 83.]

supra. No court of equity would have compelled its delivery: 2 Kent's Com. 438. A court of equity will not enforce an unexecuted voluntary agreement: *Colman vs. Sarrsel*, 1 Ves. Jr. 50. It is true, a seal in law imports a consideration when the instrument has been delivered; but prior to a delivery, or some act which is equivalent thereto, no such presumption is created: *Pringle vs. Pringle*, *supra*. The case of *Raybold vs. Raybold*, 8 Har. 308, and *Crawford's Appeal*, 11 P. F. Smith, 53, are entirely consistent with the result at which we have arrived. In each of them there was a valuable consideration to support the trust.

*In the former was the additional fact, that the property was purchased with the money of the persons claiming the benefit of the trust, and the trustee had in compliance with their request, caused a deed to be prepared in pursuance of the trust, although it was not executed. In the latter there had been a distinct credit entered on the books in favor of the claimant.

We think the court erred in sustaining the exceptions to the auditor's report, and in awarding the money to John W. Hicks.

The errors assigned are sustained.

The decree is reversed, the exceptions to the auditor's report are dismissed, and the record ordered to be remitted to the Orphans' Court, to make distribution accordingly, and it is ordered that the costs of this appeal be paid by the appellee.

THE PHILADELPHIA AND READING RAILROAD CO. *vs.* LONG.

1. In an action against a railroad company for killing a child two years and two months old, the question as to the position of the child, whether the engineer could see it, and the rate of speed of the train, were properly left to the jury.
2. The court below charged that the fact that the child was found in the street affords strong presumption of negligence; but the jury were to consider whether the mother took reasonable care of the child; if she did not, it was negligence. *Held*, correct.

Error to the District Court of Philadelphia. Opinion delivered February 24, 1874, by

AGNEW, C. J.—This case has been argued by the eminent counsel of the railroad company as if the facts were fixed with the certainty of a special verdict. If we assume that the child, Rosanna Long, suddenly appeared upon the track, five or six feet ahead of the locomotive on the left hand side; that the engineer was in his proper place on the right side of the engine cab, looking out constantly, but his vision, for several feet in front of the cow-catcher, was obstructed by the boiler and carriage of the engine; and that the fireman was at his post ringing the bell, and unable to keep a look-out on the left hand side of the engine; we might conclude that the death of the child was an accident not within the power of the engineer to avoid, and that the court might have given a binding instruction to the jury. Then, indeed, the rate of speed would be immaterial, for, upon such a sudden appearance of the child on the track, no rate of speed, no matter how slow, could have saved it. But it was because these facts were not so fixed and certain, that the question of negligence must necessarily go to the jury, to ascertain exactly how they were; and for the same reason

[*Original Edition, p. 84.]

the rate of speed became an element properly belonging to the case. Only two witnesses saw the accident happen. One of them, S. A. Moore, coming out of an alley into Cotton street, which crosses Cresson street and the railroad track at right angles, saw the child and the locomotive at the same instant, at the crossing. To him the sight *and the accident were simultaneous, so that his testimony gives us no information of the previous position of the child while the train was moving up Cresson from Gay street to Cotton. The other witness, Benj. Levering, saw more. He crossed Cresson at Cotton street; saw the engine coming. Saw it when it left the depot at Gay street. The child was then on the upper side of the road; after crossing, he himself turned up Cresson street, and in doing this turned his back upon the child; for he says, just as I turned round the child went on the track, and the cow-catcher struck her, the train then going over eight miles an hour. In his cross-examination he says, when he got opposite to the store at the upper corner of Cotton street, the child was then on the side of Mr. Long's house, and when he got over, the child was between the tracks. Thus it is very evident the testimony of this, the only witness who saw the child before the train reached Cotton street, left it an open question of fact where the child was, and whether she was not visible to the engineer had he kept a constant look-out while the train was moving up Cresson street, before it reached Cotton street, and whether a slower rate of speed would not have enabled the engineer to discover the child, as well as to reverse his engine before it came upon her. Two of the witnesses testify the speed to have been not less than eight miles an hour, and Levering gives as a reason for his belief, that he had lived there all his lifetime, and of course was in the habit of judging of the speed. Thus it is evident that the position of the child while the train was moving up Cresson street, the lookout of the engineer, the place of the fireman, the rate of speed, and all the circumstances, were matters entering into the question of negligence, taken into connection, also, with the all-important fact that Manayunk is a closely built, populous town, Cresson street a public thoroughfare, not of great width, where many persons of all ages, sexes, and condition are constantly passing and repassing, and crossing the tracks of the railroad rightfully. It was, therefore, clearly the province of the jury to ascertain from the evidence the true position of the child while the train was moving up Cresson street, when and how far the engineer ought to have seen the child in advance of the locomotive, and whether he was keeping a due look-out, and a properly regulated rate of speed, in traversing a populous street. It was in view of this duty of the jury, the instructions of the judge, contained in the first three assignments of error, were apposite and correct. We disagree emphatically to the position taken by the learned counsel of the railroad company that the rate of speed at the time was not material, and that seven or eight miles an hour is a rate of speed compatible with safety in passing through the streets of a populous town. While it is true that trains must be run at a high rate of speed to reach their greatest utility, populous towns and cities must be ex-

[* *Original Edition*, p. 85.]

ceptions, when the speed must be moderated in view of the danger to life, limb, and property. Where the people and the trains have a common right to be, and to have a joint use *of the highway, the rights of each must be regarded. These remarks dispose of the first three assignments of error.

There can be no just complaint against that part of the charge recited in the fourth assignment. It does not contradict the answer to the defendant's fourth point. The learned judge affirmed all his points, including the fourth; stating that it is negligence and would prevent a recovery for parents to suffer an infant less than two years and two months old to wander upon a railroad track where trains are constantly passing. In that part of the charge recited in the fourth assignment, the judge said, "that the fact that the child is found in the street affords a strong presumption of negligence on the part of the plaintiffs. You will, therefore, consider whether the mother took reasonable care of the child; if she did not, it was negligence." To suffer a child to wander on the street has the sense of permit. If such permission or sufferance exist, it is negligence. This is the assertion of a principle. But whether the mother did suffer the child to wander is a matter of fact, and is the subject of evidence, and this must depend on the care she took of her child. Such care must be reasonable care dependent on the circumstances. This is a fact for the jury. If she did not exercise this care she was negligent. What more than this can be demanded of her? When a railroad runs through a populous city has the company a right to exact a harder measure, and are we to say, as a matter of law, that the citizens are to be imprisoned in their houses, or their children caged like birds, otherwise it is negligence? Is it negligence for the poor who congregate these crowded streets, unless, even in the summer's heat, they live shut up in the noisome vapors of their closed tenements, without a breath of healthy air? Is this the life they must lead or be adjudged to be negligent? This mother gave her child a piece of bread, to satisfy it, closed the kitchen door to keep it in, and went to the next room to scrub the oil cloth on the floor, and before her labor was finished and in less than five minutes, the mangled body of her little one was brought in and laid before her. We have no reason to believe that her love for her child was less than that of the more favored of her sex, having servants at their beck. Because the child managed to lift the latch and momentarily disappeared, are we to say this was negligence *per se*, and that she suffered her child to wander into the street? What sort of justice is that which tells the mother agonizing over her dying child, your negligence caused this? You suffered your child to run into the jaws of death. We cannot perceive any fault in the railroad company. A speed of eight miles an hour along this populous thoroughfare was all right. We can endorse no such cruel doctrine; but we must say, as was said in *Kay vs. Railroad Company*, the doctrine which imputes negligence to a parent in such a case is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil: 15 P. F. Smith 276. The judgment is affirmed.

[*Original Edition, p. 86.]

*COBB vs. BENNETT et al.

The right of fishing in a river is subordinate to that of navigation, but this does not excuse the master of a vessel from running into and damaging a net of a fisherman, where he could change the course of the vessel *without prejudice to the reasonable prosecution of his voyage*, and thus avoid the net.

Error to the District Court of Philadelphia. Opinion delivered February 24, 1874, by

AGNEW, C. J.—We discover no error in the portions of the charge assigned for error. They may all be comprised in the following instruction: "I charge, as a question of law, he (the defendant) was bound to shorten his tack, if he could thereby have avoided the nets, without prejudice to the reasonable prosecution of his voyage." This was said in view of the facts in evidence on part of the plaintiff, that the defendant was notified of the position of the net of the plaintiff; pointed to the light which marked that position, and requested to change his course, so as not to foul it, and that this could be done conveniently. The judge had already said: "But there is another right in the river, that of navigation, which is superior to the right of fishing, and when they interfere, that of fishing must give way to the right of navigation." He had also said: "Those exercising the rights of navigation will not be excused, if they are sufficiently warned, unless they make a reasonable effort to avoid them. Now, surely, it is not error to say that when the mariner is warned of his approach toward the net of the fisherman, he should change the course of his vessel, if he can do so without prejudice to the reasonable prosecution of his voyage." The entire point of the charge is contained in this qualification, and, hence, it was not doing full justice to the charge to omit the qualifying words in the assignment. What would be a reasonable prosecution of the voyage would depend on the attendant circumstances, and upon these a special instruction might have been called for. Without the qualification there would have been error, for we must agree that the mariner is not bound to shorten his tack merely because a net is stretched across his course. A vessel is entitled to take her course in the navigation of the river, and to hold it, without regard to the fisherman's net, provided the master act without wantonness or malice, and do no unnecessary damage. This is an obvious consequence of the superior right of navigation. But this, we think, was the very doctrine of the charge, and the exception contained in the qualification, in view of the facts in evidence. If the mariner, warned of the position of the net, and requested to change his tack may do so "without prejudice to the reasonable prosecution of his voyage," can we say he is exercising his superior right of navigation justly, and in the spirit of the maxim, *sic utere tuo ut alienum non ludas*, if, indifferent to the inferior right, he recklessly holds on his way, and fouls and injures the fisherman's net? Certainly we cannot say this, for, in effect, it would be to say a fisherman has no rights whatever—that being no right *which another may disregard under all circumstances. In view of the

legislation, both of Pennsylvania and New Jersey, the usages of fishing, and the decisions in our own State, there is a right of fishing in the Delaware, though subordinate to the right of navigation, which cannot be unnecessarily impeded by it. Fisheries attached to the riparian ownership are valuable, and command high rents. This subject will be found to be discussed at great length and with much research by brother Sharswood, in the case of the *Tinicum Fishing Co. vs. Carter*, 11 P. F. Smith, 21. It, therefore, needs no further discussion here. The right of fishery is an acknowledged one, though it is entirely subordinate to that of navigation, and we intend, in this opinion, to lay down no principles which would burden commerce or restrict the navigator's rights, beyond that which his evident duty to others would justly require. Indeed, the question upon the charge comes down to this: Is it wantonness, when a mariner, warned of the net, seeing the light marking its position, and requested to avoid it, yet, indifferent to the interests of the fisherman, keeps on his course, when a reasonable pursuit of his voyage would not be prejudiced by avoiding the net? Wantonness is reckless sport, wilfully unrestrained action, running immoderately into excess. If a man will do an injury, when he may reasonably avoid doing so, without inconvenience to himself, can it be said he is blameless? Is it not worse than wantonness; is it not rather malice, where he may, without prejudice to the reasonable enjoyment of his own right, desist from an injury to another, and yet will persist in committing it? Now, unless we deny this proposition, we cannot reverse. If there were anything exceptional in the facts, or contradictory in the evidence, it was in the power of the defendant to ask specific instructions upon the precise state of the facts as appearing on either side. If, by reason of the veering of the wind to the northeast, the running of the tide with the course of the vessel, the want of men on deck at the moment, or other sufficient cause, it would have been difficult, or even unreasonably inconvenient to shorten the tack of the vessel, or change its course, the instruction might have been asked, that in such a case the master was not bound to luff or shorten tack. We agree with the counsel of the plaintiff in error, that the interests of navigation are all-important to a port like that of Philadelphia, and are not required to give way to the minor and subordinate right of fishing. But, in absence of a call for instruction on the point so much insisted upon in the argument, we cannot say the court erred in the general instructions contained in the charge. There was evidence of malice sufficient to take the case to the jury, to whom it belonged, and not to the court, to say whether the language used—"to hell with your net"—was a mere superfluity of maritime civility, or was indicative of malice.

Judgment affirmed.

[*Original Edition, p. 88.*]

*Supreme Court of Pennsylvania.

ST. CLAIR COAL COMPANY vs. MARTZ.

After pleading payment to a *scire facias* on a mechanic's lien, no question as to the sufficiency of the lien can be raised.

Under the act of February 17, 1858, a lien was filed for a patent hoisting and dumping cage, against the entire leasehold estate of a colliery.

Held, That the act of assembly gave the mechanic no such lien. It confines the lien clearly to the interest of the lessees in the improvement and machinery upon which his labor and services were bestowed.

Error to the Court of Common Pleas of Schuylkill County.
Opinion delivered March 16, 1874, by

SHARSWOOD, J.—In *Lee vs. Burke*, 16 P. F. Smith, 336, upon a *scire facias* on a mechanic's claim, when the parties went to trial upon the pleas of "no lien, payment set off with leave," it was held that no question of the sufficiency of the lien could arise on the trial of these issues—that even the plea of "no lien" was necessarily confined to such questions of fact as might invalidate the lien, such as that it was not filed in time, that the work was not done or the materials furnished on the credit of the building, that the plaintiffs had bound themselves to file no claim, or that the building was not such a one as was within the acts of assembly. But as to defects on the face of the claim filed; they are not raised by such a plea. *A fortiori* is this so, when the only issue is upon the plea of payment. The question as to the sufficiency of the claim can be raised on demurrer or by moving to strike off the lien, but after pleading to the *scire facias*, it must be considered waived: *Lehman vs. Thomas*, 5 W. & S. 262; *Lybrandt vs. Eberly*, 12 Casey, 347; *Howell vs. The City*, 2 Wright, 471.

In the *Bank vs. Gries*, 11 Casey, 423, it was decided that an architect employed to make the plan and drawings for a building, and to direct and oversee its erection in accordance therewith, is within the provision of the mechanic's lien law and entitled to a lien against the building for his labor. That the value of the services of such an architect might be enhanced by a patent right of which he was the proprietor, can hardly be doubted, and if a specific agreement is made with him for a certain sum for the use of his patent and his superintendence in putting it up, he is certainly entitled to file a lien for that amount and to recover it upon proceeding by *scire facias*.

As we have seen that the question of sufficiency of the lien was not involved in the issue of facts presented on the pleading, it could not be the subject of a reservation, and even if the lien was insufficient on its face, no judgment *non obstante veredicto*, could have been properly entered.

*This disposes of all the errors assigned, except the fourth, which remains to be considered. The lien was filed against all the right, title, and interest of the St. Clair Coal Company, of, in, and to all that certain improvement, machinery, and fixtures which are part of, and together make the erection known as the St. Clair shaft col-

[*Original Edition, pp. 89 and 90.]

liery; the said colliery having been leased, etc., for mining purposes. The act of assembly under which this claim was filed, was approved February 17, 1858, Pamph. L. 29, and is entitled "An act relative to mechanics' liens in the counties of Luzerne and Schuylkill." It extends the provisions of the general act of 1836 "to all improvements, engines, pumps, machinery, screens, and fixtures erected or put up by tenants of leased estates on land of others in the counties of Luzerne and Schuylkill, and to all mechanics, machinists and material men doing work or furnishing the articles or materials therefor: provided, that the lien hereby created shall extend only to the interest of the tenant or tenants, lessee or lessees therein, and to the improvements, engines, pumps, machinery, screens and fixtures erected, repaired or put up by the mechanics, machinists, persons or materialmen entering liens thereon." The claim of the plaintiff was for work done in the erection of a patent hoisting and dumping cage, yet the claim filed is against the entire leasehold interest in the colliery. The act of assembly gave the plaintiff no such lien. It confines the lien clearly to the interest of the lessees in the improvement and machinery upon which his labor and services were bestowed. Upon an execution on the judgment upon this *scire facias*, the leasehold interest in the entire colliery could be levied upon and sold. This fatal error in the claim, though not regularly, is substantially assigned. It certainly was not waived as merely formally defective and by going to trial on the issue of payment. In *Casey vs. Winterstein*, 10 P. F. Smith, 395, where the lien was filed against the owners and not the lessees of "a certain frame engine and shaft house," etc., judgment recovered on the *scire facias* was reversed on that account. For that reason the judgment in this case cannot be sustained. The defendants below are entitled to an affirmative answer to their fifth point.

Judgment reversed.

PHILLIPS vs. REAGAN.

An actual levy upon the goods which are the subject matter of the adverse claim is not necessary to a sheriff's interpleader.

Error to the Court of Common Pleas of Schuylkill County. Opinion delivered March 9, 1874, by

SHARSWOOD, J.—Under the ninth section of the act of April 10, 1848, Pamph. L. 450, it is not necessary to a sheriff's interpleader that there should have been an actual levy upon the goods which are the subject matter of the adverse claim. The words of the act are, when any "such claim has been or shall be made to any goods or chattels taken or "entitled to be taken in execution." The English Statute of 1 and 2 Will. 4, c. 58, s. 6, from which our act seems to have been copied, provides, "When any such claim shall be made to any goods or chattels taken or intended to be taken in execution." In *Day vs. Carr*, 7 Exch. Rep. 883, 16 Eng. Law and Eq. Rep. 578, it was held by the Court of Exchequer, that no actual seizure or levy upon the goods was necessary. "The interpleader act," says Pollock, C. B., "clearly empowers the sheriff to apply to

[*Original Edition, p. 91.]

the court, if he goes with the intention of levying under a *fi. fa.* and a claim is set up to the goods; and in many cases he may be well justified in applying to the court before he perils himself by an actual seizure, under circumstances which might perhaps subject him not only to an action for the value of the goods, but also for damages for taking them." The statute requires an intention in the sheriff, and therefore when he withdraws from the possession upon an adverse claim he is not entitled to be relieved: *Nolton vs. Guntrip*, 3 M. & W. 145. Our act is even broader than the English statute, by substituting the word "entitled" for the word "intended." There is great reason why, when the goods of one man may be taken under an execution against another, that an actual levy should not be necessary. Every purpose of the act may be accomplished without it. Especially is this so when the goods are in the actual possession, not of the defendant in the execution, but of the adverse claimant. A very serious injury might be done to such a party by closing his store and putting a watchman in charge, even for the short period of time necessary to procure the order of the court for the interpleader.

It may be that upon the rule by the sheriff calling upon the parties to interplead, the plaintiff in the execution may insist, for his own security, upon an actual levy and inventory. That seems to have been the case in *Baron vs. McMackin*, in the District Court of Philadelphia, 1 Troubat & Haly, 723-4. The dictum there was upon such a rule. But surely the claimant in whose possession the goods are has no such right. He is called upon to maintain or abandon his claim, and if he maintains it and gives bond he retains the possession, and if he abandons, a levy must follow. When an issue is formed to try the property under the order of the court, all questions as to the right of the sheriff to relief are concluded by the order, and the parties go to trial simply upon the issue awarded. We think, therefore, that the learned judge below fell into an error in directing a verdict for the plaintiff in the issue because there had been no actual levy. The other errors assigned do not need to be noticed. We think the rulings upon points of evidence were correct.

Judgment reversed and *venire facias de novo* awarded.

***THE NEW SCHOONER MAGGIE CAIN *et al.* vs. WM. M. SHAKESPEARE.**

A contract to build a vessel is a contract to be performed on land, and falling within the ordinary common law and belongs to State jurisdiction, and a State has a right to give a lien against her for work and materials entering into her construction.

Error to the District Court of Philadelphia. Opinion delivered February 24, 1874, by

AGNEW, C. J.—The lien given by the act of 13th of June, 1836, for work done and materials furnished in the building of ships and vessels of all kinds, is expressly confined to certain classes of tradesmen and mechanics, to wit, carpenters, blacksmiths, mast-makers, boatbuilders, blockmakers, ropemakers, sailmakers, riggers, joiners, carders, plumbers, painters, ship chandlers, and others

[*Original Edition, p. 92.]

named, concluding with lumber merchants. These are the individuals who actually do the work and furnish the materials for building and equipping the vessel, and evidently are not the general contractor who agrees to build the vessel for another. As to him, no lien is necessary, for he can always provide for his own security by his contract, and is not bound to deliver the vessel until paid for her, unless he choose by his agreement to do so. This is the very ground of the decision in *Walker vs. Nushutz*, 6 W. & S. 519, a case directly in point. In the case before us, William Fisher and son were the owners of the schooner, to whom the libellant furnished the materials for her. The contract with Lathbury, Wickersham & Co. having fallen through, they were left with the unfinished hull on their hands, and in this condition they made their contract with Andrew Scull and others to build and finish the hull of a three-mast schooner, then in frame, for the sum of \$18,000, payable in instalments as the work progressed, the last \$2,000 being payable when the schooner was finished. In no part of this contract is there any agreement to deliver before her completion, nor is such an intent discoverable. Clearly the persons thus contracting for a finished vessel were not entitled to possession until payment in full; so that title did not vest in them until the finishing of the vessel and delivery of possession. Fisher and son were, therefore, the owners when Shakespeare furnished the materials, for which he claimed his lien. The period of time between the abandonment of Lathbury, Wickersham & Co., and the new contract with Scull and others, was wholly immaterial in the case, for neither by the contract with Lathbury, Wickersham & Co., nor with Scull and others, did title or possession pass out of William Fisher and son—by neither were they bound to deliver the vessel before final payment. Hence the general finding of the jury was all that was necessary, and the special finding directed by the court was wholly immaterial, and did neither good nor harm so far as the final result was necessarily involved. The errors complained of in regard to the special verdict are, therefore, without injury, and need no correction. William Fisher and son being the owners of the vessel, this *fact disposes of all the errors specified, except that of jurisdiction. It is contended that a lien such as this, incurred in the building of a vessel, is not within the jurisdiction of a State court, but falls within the Federal jurisdiction, under the constitution of the United States, and must be enforced in an Admiralty Court. We do not think so. A contract to build a vessel is a contract to be performed on land, falling within ordinary common law, and belongs to the State jurisdiction. It differs not from a contract to build a wagon or a railroad car, made between citizens of the same State, and cannot be drawn into the Federal courts, because the vessel is intended to become a subject of maritime law. Whatever question may arise as to those liens, which the act of 1836 seeks to enforce against a finished vessel, after she has entered her appropriate element, certainly there can be none as to liens upon a vessel for work and materials entering into her construction, before she has passed within the dominion of maritime law. Some dicta and District Court decisions to the contrary

[*Original Edition, p. 98.]

were overruled in *People's Ferry Co. vs. Beers*, 20 Howard, 393; *Roach vs. Chapman*, 22 Howard, 129.

Finding no error in the record, the judgment is affirmed.

ARNOLD'S ADMINISTRATORS, *for use*, vs. FITZGERALD.

If a vendee fails to pay the amount due and surrenders back the possession of the property, he cannot be compelled to satisfy a judgment which was to have been a part payment for the property.

Error to the Court of Common Pleas of Armstrong County. Opinion delivered March 2, 1874, by

WILLIAMS, J.—These two cases depending on the same facts were tried together under the same instructions, and as the assignments of error are the same in both, the judgments must stand or fall together. The defence set up to the writ of *scire facias* was that the judgments were paid and satisfied under the agreement between the parties of the 11th of April, 1860. By this agreement the defendant sold to the plaintiff's intestate a tract of land for nineteen hundred dollars, to be paid in the following manner, viz.: one thousand and two dollars and seventy-nine cents on the 1st of May, 1860, by entering satisfaction on the judgments in controversy, one-half of the residue on the 10th of May, 1861, and the remaining half on the 10th of May, 1862. The evidence showed that the decedent took possession of the land and paid one hundred and one dollars of the purchase money; that the defendant instituted an action of ejectment against him in the Common Pleas of Armstrong County and recovered a verdict and judgment for the land to be released on the payment of two thousand and fifteen dollars and seventy-six cents within thirty days from date, with interest. The vendee failed to pay the amount found to be due by the jury and surrendered possession of the *land to the vendor. It is clear that his failure to pay the purchase money within the time prescribed by the conditional verdict and judgment operated as a dissolution of the contract and put an end to all the rights and obligations of the parties under it: *Potts' Appeal*, 5 Barr, 501. The vendor could no longer demand or maintain an action for the unpaid purchase money, nor could he compel the vendee to satisfy the judgments if they were unsatisfied when the recovery was had. They were not satisfied in fact; were they satisfied in law or in equity? The agreement to pay a portion of the purchase money by entering satisfaction on the judgments was executory. Was it performed by the vendee? If so, when and how? The delivery of the possession of the land by the vendor to the vendee was not a performance of the latter's covenant to enter satisfaction on the judgment, nor was it a satisfaction of the judgments in fact or in law. Was it then a satisfaction of them in equity? Why should it be, if it was not so understood and treated by the parties? Why should the vendor, after getting back the land, be entitled to have the judgments satisfied? He has no more equity to have a portion of the purchase money paid by a satisfaction of the judgment against him than he had to have the residue paid in money. By his recovery in the

[*Original Edition, p. 94.]

ejectment he elected to rescind the contract if the vendee did not pay the purchase money within the time limited by the conditional verdict and judgment, and he must abide by his election. If the judgments were not satisfied when the contract was rescinded, clearly he has no legal or equitable right to have them satisfied now. The amount of purchase money found to be due by the jury is conclusive that the judgments were not then satisfied. The plaintiff's fourth and fifth points should therefore have been affirmed. This view of the case cuts up the defence by the roots and renders it unnecessary to consider the questions raised by the other assignments of error.

Judgment reversed and a *venire facias de novo* awarded.

This judgment to be entered by the prothonotary in each case.

APPEAL OF BUTTERFIELD'S EXECUTORS.

1. A wife gave a mortgage, *without joining her husband*, on property which was in her name; judgment was afterwards obtained on the mortgage, and the property was sold by the sheriff on a judgment against the husband and wife. *Held*, on distribution of the fund that, after payment of prior liens, it should be appropriated to the judgment on the mortgage.
2. The judgment on the mortgage might have been reversed or set aside at the instance of the wife, but until directly avoided by her, it cannot be impeached collaterally except for fraud.

Appeal from the decree of the District Court of Allegheny County. Opinion delivered *March 2, 1874*, by

WILLIAMS, J.—The legal title to the land sold by the sheriff was in the wife, and, though the equitable estate was in the husband, he could *not compel a conveyance of the wife's legal title without refunding to her the purchase money which she paid to O'Hara, in order to procure it. The sale on the judgment against the husband and wife divested the titles of both. How, then, shall the proceeds of sale be distributed? Shall the residue, after satisfying the judgment on which the property was sold, and the other liens and charges for which the husband was liable, be given to the husband, as decreed by the District Court, or shall it be distributed between the husband and the representatives of the wife's mortgagee, as claimed by the appellants? If the controversy was between the husband and wife, manifestly, the fund should be divided between them in accordance with their respective rights and equities. The evidence shows that in 1847 the husband purchased the land of O'Hara for the sum of four hundred dollars; that he built a two-story brick dwelling house and frame kitchen thereon and paid forty or fifty dollars of the purchase money. In 1867 the wife paid the residue, amounting to six hundred and sixty-nine dollars and fifty cents, and obtained from O'Hara a deed for the land. The sum paid by the wife with interest to the sheriff's sale is, then, the measure of her interest in the land and of her share of the proceeds of sale. If so, it is clear that the husband would not be entitled as against the wife to the whole of the fund left for distribution, but only to the residue after reimbursing the wife the amount of the purchase money paid O'Hara. But the controversy here is not between the

[* *Original Edition*, p. 95.]

husband and wife, but between the husband and the legal representatives of the wife's mortgagee. Are the latter, then, entitled to the wife's share of the fund? If not, they have no standing in court, and it is immaterial what are the equities between the husband and wife. If it be conceded that the wife had no power to execute the mortgage as a *feme sole* trader, and that the mortgage was void because the husband did not join with her in its execution, it does not follow that the judgment obtained against the wife on the mortgage was a nullity. On the contrary, the execution of the mortgage is conclusively established by the judgment in the *scire facias* upon it: *Edmundson vs. Nichols*, 10 Harris, 74. The mortgage is merged in the judgment, and, even if null and void, cannot be collaterally impeached: *Hartman vs. Ogborn*, 4 P. F. S. 120. In this respect the judgment on a mortgage under the act of 1705, which is a proceeding *in rem.*, differs from a judgment *in personam*, on the bond of a married woman, which is absolutely void. Doubtless the judgment on the mortgage was voidable and might have been set aside or reversed at the instance of the wife, but until directly avoided by her its validity cannot be inquired into or impugned collaterally except for fraud: *Louber's Appeal*, 9 W. & S. 387; *Billings vs. Russel*, 11 Harris, 184; *Yaple vs. Titus*, 5 Wr. 195. The judgment on the mortgage, then, cannot be disregarded, but must be treated as conclusive in this proceeding: *Thompson's Appeal*, 7 P. F. Smith, 175; if so, it bound the wife's interest in the land and is entitled to so much of the fund as was produced by the sale thereof. The decree of the District Court must, therefore, be reversed and the wife's share of the proceeds of the sale be appropriated to the judgment on the mortgage and the residue to the husband. Distributing the fund in this way will do exact justice between the parties. It will give to the appellants the money which the mortgagee lent the wife to enable her to pay the purchase money and procure a deed for the land; and it will give to the husband the proceeds realized from the sale of his equitable estate, and he can claim no more in law or equity.

And now, March 2, 1874, it is ordered, adjudged and decreed that the decree of the District Court, distributing the residue of the proceeds of the sheriff's sale, viz., the sum of twelve hundred and thirty-four dollars and sixty-six cents to Philip Weyman, be reversed and set aside, and it is further ordered, adjudged and decreed that part of the said sum, viz., six hundred and sixty-nine 50-100ths dollars, with interest thereon, from April 10, 1867, to December 1, 1871, amounting to eight hundred and fifty-five dollars and ninety-five cents (\$855.95), be distributed and paid to the appellants, executors of Jonas Butterfield, deceased, on judgment *Sur Mortgage vs. Cutharine Weyman*, No. 1008, December Term, 1871, and that the residue of said sum, viz., three hundred and seventy-eight 71-100ths dollars (\$378.71), be distributed and paid to Philip Weyman, the appellee, after deducting therefrom the costs of this appeal.

**Twenty-first Judicial District.*

Court of Common Pleas, Schuylkill County.

BRIGHT & Co. vs. THE OAK DALE COAL & MINING Co.

The act of April 14, 1851, authorizing judgments to be taken in certain cases where no affidavit of defence is filed, in Schuylkill county, is not annulled or repealed by section 26 of article V. of the new constitution.

Where it was intended by the constitution to annul or abrogate any existing law, the intention is expressed in unambiguous language.

Rule to show cause why judgment taken for want of an affidavit of defence should not be set aside, etc. Opinion delivered *March 23, 1874*, by

PERSHING, P. J.—A special act of assembly for the county of Schuylkill, approved April 14, 1851, authorizes the taking of judgment in certain cases where no affidavit of defence is filed. By the 47th rule of court, judgments under said act may be taken on any motion day after twenty days from the return day of the writ. Section 26, article V., of the constitution provides that “all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction and powers of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process and judgments of said courts, shall be uniform,” etc.

It is contended that the act of 14th of April, 1851, being a special law, applicable alone to Schuylkill county, is annulled or repealed by that clause of the recited section which requires all laws relating to courts to be general and of uniform operation; that said act is inconsistent with the constitution, and therefore not kept in force by the second section of the schedule. In this case, and another recently before us, this view has been pressed with great earnestness, and the power of the court to give judgment for want of an affidavit of defence, explicitly denied. We are thus compelled to decide the question of power raised.

Giving the words in this section their natural and ordinary meaning, which is a cardinal rule of interpretation, there is nothing which indicates an intention to repeal the laws relating to courts which were in existence at the time of the adoption of the constitution. We think it is future legislation that is provided for, and not the abrogation of past enactments of the legislature on this subject. The construction insisted upon by those who deny our power under the act of 1851, and the rule of court based upon it, to give judgment for want of an affidavit of defence, abrogates in every judicial district throughout the State such rules as are not general and of uniform operation, and this, without providing any way of ascertaining what rules are general and of uniform application in all of the many courts of the State. A repeal so sweeping cannot be gathered from a fair interpretation of the language employed in this 26th section.

Sir Edward Coke declares that the most natural and genuine method of expounding a statute is by examining the whole, with a

[**Original Edition, pp. 97 and 98.*]

view to arrive at the true intention of each part. An examination of the constitution shows that when it was the purpose to annul or abrogate any existing statute, as a result of the adoption of that instrument, the intention was expressed in unambiguous language. Section 11 of the schedule "abolishes" the court of criminal jurisdiction for the counties of Schuylkill, Dauphin, and Lebanon. By section 21, article iii., "Acts now existing are avoided" which limit the time within which suits may be brought against corporations for injuries to persons and property; and by section 22 of the same article, "Acts now existing are avoided" authorizing the investment of trust funds in the bonds or stock of any private corporation. All existing charters under which a *bona fide* organization had not taken place at the date of the adoption of the constitution, were made of "no validity" by section 1, of article xvi. No clause avoiding or making of no validity existing acts can be found in section 26, of article v. If the effect of repealing or abrogating existing statutes is given to this section, the same effect must be given to other sections where similar language is employed. For example, section 1, article ix., provides that "all taxes shall be uniform, upon the same class of subjects, . . . and shall be levied and collected under general laws," etc. Can it be claimed that this, *ipso facto*, repeals the tax laws existing at the time the constitution was ratified by the people?

When the inquiry is directed to ascertain the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Cooley's Constitutional Limitation, p. *65. In the sixth volume of the Debates of the Convention, page 507, *et seq.*, will be found section 26 of article v. The section, as reported from the committee, was as follows: "All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgment and decision of such courts shall be uniform."

It is a fact of some weight that the convention amended the section by striking out the words "proceedings and practice." It was shown that the systems of practice in different portions of the State were so various that the adoption of the section as reported might cause much embarrassment. The chairman of the judiciary committee (Mr. Armstrong), said, "This section, if adopted, would not apply to laws as they at present exist, but only as to future legislation, and with the amendment suggested" (striking out the words "proceedings and practice"), "I think it *a section of very great importance." These proceedings show that it was intended and understood by the convention that the 26th section of article v. should have a prospective operation, and that the general and uniform laws relating to the courts commanded by it were to be the work of the legislature in the future.

A constitution shall operate prospectively only, unless the words employed show a clear intention that it shall have a retrospective effect. Cooley, Const. Lim. *62. The same rule applies to statutes.

[*Original Edition, p. 99.]

Ibid. Statutes are always construed as prospective, unless courts are constrained to the contrary by the rigor of the phraseology: *Price vs. Mott*, 2 P. F. S. 315, per Woodward, C. J. The seventh section of article iii. and the 26th section of article v. relate to the same subject, and can properly be read together, and when so read, the prospective character of these constitutional provisions will be very apparent. Article iii., section 7: "The general assembly shall not pass any local or special law . . . regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts," etc. But article v., section 26: "All laws relating to courts shall be general, and of uniform operation."

If this mode of reaching a decision is not satisfactory, we have the assistance of judicial investigation. In examining the question in this case, we have found a case which fairly rules it. In *Allbyer vs. State*, 10 Ohio, N. S. 588, a question arose under the provision of the constitution of the State of Ohio that "all laws of a general nature shall have a uniform operation throughout the State." Another clause provided that all laws then in force, not inconsistent with the constitution, should continue in force until amended or repealed. This clause is almost identical in language with the second section of the schedule of the constitution recently adopted in this State. Allbyer was convicted and sentenced to imprisonment under a crimes act previously in force, applicable to Hamilton county only, and the question was, whether that act was not inconsistent with the provision above quoted, and, therefore, repealed by it. The court held that the provision quoted evidently had regard to future and not to past legislation, and, therefore, was not repealed. It is said a similar decision was made in *State vs. Barbee*, 8 Indiana, 258. It seems to us that both reason and authority are against the position taken by the counsel for defendant.

The rule granted in this case to show cause why the judgment taken against the defendant for want of an affidavit of defence should not be set aside upon the ground, that the power of the court to give judgment for want of such affidavit under the act of April 14, 1851, is taken away by section 26, of article 5, of the constitution, is discharged.

*Supreme Court of Pennsylvania.

STERLING vs. STEWART.

Where two persons signed a note, and one of them paid his half and received a receipt "in full for his half of the note," this does not release his liability as surety for the remaining half.

Error to the Court of Common Pleas of Greene County. Opinion delivered March 2, 1874, by

WILLIAMS, J.—The plaintiff below, the defendant in error, lent to Cooper & Sterling five hundred dollars, two hundred and fifty dollars to each, and took from them a joint and several note or obligation under seal for the whole amount, payable one day after date; upon this suit was brought. Under the instructions of the court

[*Original Edition, p. 100.]

the jury found that the defendant, Sterling, did not sign the note as alleged, in pursuance of a promise on the part of plaintiff, that if he would sign it he would not hold him for more than the half of it. He was therefore clearly liable for one-half of the note as principal debtor, and for the remaining half as the surety of Cooper, his co-promissor. He paid, as is admitted, the one-half of the note, and he insists that he is discharged from his liability for the residue, because the plaintiff agreed that if he would pay it he would give him a receipt in full for his half of the note: and when he paid it the plaintiff gave him such a receipt. Was this a release or discharge of his liability as surety for the residue of the note? Why should it be, if the plaintiff did not promise or agree to acquit or release him from his liability? No such promise or undertaking is suggested in the point submitted, the refusal of which is assigned as error; nor can it be inferred or implied from the facts of which it is predicated. The court was asked to charge, "that if the jury believed that Stewart told Sterling that if he would pay his half of the note that he would give him a receipt in full for his half of the note; and that Sterling then paid him the one-half of the note and interest, and Stewart gave him a receipt therefor, in which he stated that it was in full for his half of the note given by Cooper and Sterling to A. P. Stewart, the plaintiff is not entitled to recover." What then did the plaintiff promise, and what did he do, taking all the facts set out in the point to be true? He agreed that if Sterling "would pay his half of the note that he would give him a receipt in full for his half of the note," and he kept his promise to the letter. There is no suggestion in the point of a promise by the plaintiff to release Sterling on the payment of his half of the note from his liability as the surety of Cooper for the remaining half. How then can such a promise or undertaking be inferred or implied? A promise without any consideration is void: and the law will not infer or imply a promise if there is no consideration or moral obligation to support it. Here there was neither. The defendant in paying the one-half of the note only discharged the obligation resting upon him as principal debtor. And the plaintiff in receiving it was under no obligation, legal or moral, to release him from his liability for the residue as the surety of Cooper. The vexed question, whether an express promise or undertaking by the creditor to release the debtor from liability for the whole debt on payment of a part, is valid and binding, or whether it is to be regarded as a naked promise and void for want of consideration, does not arise here, and therefore it is not necessary to discuss it. It is manifest that the defendant's point is not predicated of an express promise to release him from all liability for the note on the payment of the half thereof, nor can such a promise be inferred from the facts on which it is based. And it is equally clear that the receipt in full for his half of the note is not in itself a release of his liability as surety for the remaining half. There was, therefore, no error in refusing to charge as requested.

Judgment affirmed.

[*Original Edition, p. 101.]

CAKE vs. STIDFOLLE.

1. Actual notice is all that is required to charge an endorser.
2. Statements on information made in an affidavit of defence should be averred to be believed by defendant.

Error to Court of Common Pleas of Schuylkill County.

Suit was brought by Stidfole against Cake as endorser of a note, and an affidavit of defence was filed, as follows:

"Henry L. Cake, the defendant above named, having been sworn according to law, doth depose and say, that he has legal defence to the whole of plaintiff's claim in above suit, the nature and character of which is as follows, to wit: That deponent was an endorser on said note upon which this suit is founded; that when the same became due and payable this deponent received no notice of the non-payment of said note, excepting a certificate of its protest purporting to have been given by C. F. Shindel, a notary public; but said certificate was not given by the said notary public, as this deponent is informed, but the protest and certificate was made by a party not legally authorized to do the same. All of which deponent expects to be able to establish on the trial of the cause."

The court subsequently granted a rule on defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defence, and on December 2, 1872, the court ordered judgment to be entered in favor of the plaintiff and against the defendant for default of sufficient affidavit of defence.

Plaintiff in error contended:

1. Endorser must have immediate notice of non-payment; 4 Kent, 131; 1 Parsons on Contracts, 277; Story on Bills, 371.

2. *The act of protest must be performed by the notary public personally, and cannot be delegated: Chitty on Bills, 393; *Onondaga County Bank vs. Bates*, 3 Hill (N. Y.), p. 56.

In the note to *Mills vs. Bank of the United States* (11 Wheaton, 431), in American Leading Cases, vol. 1, p. 474 (5th edition), it is said, "of course the certificate of a notary is of no value at all when it is shown that he did not perform the service. If it was performed by a clerk, the fact must be proved by his evidence, in the common law forms," and then the following cases are cited:

Hunt vs. Maybee, 3 Selden (7 N. Y.), 266, and *Cribbs vs. Adams*, 13 Gray (Mass.), 597.

3. That the fact alleged is not stated to be within the affiant's knowledge is unimportant, as he swears that he expects to be able to establish it on the trial: *McClure vs. Bringham*, 1 T. & H. Pr. 383; *Thompson vs. Clark*, 56 Pa. S. R. 33.

Defendant in error contended that all that was necessary to charge indorser was notice: *Stephenson vs. Dickson*, 12 Harris, 148; *Rahn's Ex. vs. Philadelphia Bank*, 1 Rawle, 835, and that defendant should have stated that he believed the facts alleged: *Black vs. Halstead*, 3 Wr. 64, and that every fact necessary to constitute a defence should be stated in the affidavit: *Peck vs. Jones*, 20 P. F. Smith, 83.

[*Original Edition, p. 102.]

PER CURIAM. March 9, 1874.

The affidavit of defence does not deny actual notice. Indeed this is impliedly admitted, the qualification being that the defendant is informed that the protest and certificate were not actually made by the notary himself. This information is not averred to be believed by him, and might have been given by one who himself had no sufficient information. All that is stated might be true, and yet the defendant might have actual notice of the protest.

Judgment affirmed.

In re ESTATE OF H. T. DE SILVER, Deceased.

A was surety on a lease renewable from year to year, and having given six months' notice that he would not continue surety after the end of the current year: *Held*, that he having died in the meantime, his estate was not liable for any rent in arrear after that date.

Appeal from the decree of the Orphans' Court of Philadelphia. Opinion delivered March 9, 1874, by

AGNEW, C. J.—This was a lease for one year, renewable from year to year, if the tenant held over and the landlord gave no notice to quit; either party having power to determine it by one month's notice previous to the end of the year. The rent was payable monthly. In June, 1869, the trustees (as landlords) having written to De Silver, the surety for the tenant, about the rent, the latter replied, giving notice to collect the rent *from the tenant, and also that he would not continue surety after the end of the current year. Mrs. Anderson, the tenant, remained in possession and failed to pay the rent due on and after the first of August, 1870, and it is for this unpaid rent the trustees claim payment out of the estate of De Silver, the surety, who died September 10, 1869.

Suretyship is a purely voluntary and gratuitous relation. In strict law the surety is bound equally with the principal, but the nature of his relation often brings equity to his relief when the principal cannot receive it. But a surety cannot discharge himself from his contract at will. This was decided in *Coe vs. Vogdes*, 21 P. F. Smith, 383. His suretyship being a continuing contract, so long as his relation remains his contract continues. In that case no step was taken to prevent a renewal of the lease, and it was said, whatever might be the power of the sureties, as contended, to limit their future liability by notice against the renewal of the lease, the affidavit of defence sets forth no such notice, and no termination of the lease in fact. A mere notice that the sureties would not be liable is no defence to their covenant, for they could not dissolve the contract at pleasure.

In the present case if the surety had done nothing to prevent a renewal he could not escape his liability. But De Silver gave more than half a year's notice not to renew the lease after the expiration of the current year. Before the end of the year, and while it was still in the power of the trustees to demand other sureties from the tenant, or to give notice to her to quit, De Silver died, and his estate necessarily went into administration. Clearly after this explicit

[*Original Edition, p. 103.]

notice to collect the rent from the tenant, and not to renew the lease, and after the change in circumstances produced by the death of De Silver, it was inequitable in the trustees to continue the tenant for another year on the credit of the surety. Just the event happened which De Silver evidently had feared: Mrs. Anderson, the tenant, became unable to pay the rent. The trustees, as landlords, had no right in good conscience to continue the liability of the surety after his death, and when the law had taken charge of his estate for distribution among his own creditors and legal representatives. If they could do it for one year, they could do it so long as the tenant, though insolvent, might choose to remain, making the rent a charge on the estate of De Silver indefinitely, to the prejudice of creditors and others. The lien of the debt even upon the real estate might be perpetuated indefinitely by filing a copy of the lease and the covenant of De Silver in the prothonotary's office under the 24th section of the act of February 24, 1834. Had the contract of lease been entire for a single term, including the year 1870, the surety would not be released. But the contract was severable at the will of either party, and the united wills of both were necessary to concur in its continuance.

*It is this feature which enables equity to take hold of it and prevent a renewal to the prejudice of the surety's estate on the ground that the change in the circumstances of the parties demanded a termination of the relation of the surety in justice and good conscience. Had De Silver suffered the lease to begin again for 1870, his estate would have been liable. But his notice and death were facts probing the conscience of the landlords, who could not in equity permit a renewal of the lease on the credit of the surety, when they had it in their power to compel the tenant to give a new surety or terminate the lease.

The decree of the Orphans' Court is affirmed with costs, and appeal dismissed.

HAMBERGER vs. BROOKER *et al.*

Parol testimony is admissible to establish the existence of a waiver of condemnation, which had been a record and become lost.

Error to the District Court of Philadelphia County. Opinion delivered February 24, 1874, by

GORDON, J.—It is not within the lines of reasonable debate that a sheriff's sale of land on a *fi. fa.* without waiver of inquisition by the defendant is not merely voidable, but absolutely void. Neither can such waiver be made or established by parol; it must be done "by writing filed in the proper court." These questions do not enter into the matter now in suit.

The proof offered and made in the court below was of a lost record. Wm. Paul swears: "I was execution clerk under the sheriff in 1838, and remember the sale of this property. It was sold under a *pluries fi. fa.* and waiver of inquisition. The waiver was signed by H. Crumley, and sealed on the *fi. fa.* with a wafer. Some years

[*Original Edition, p. 104.]

after, I had occasion to examine the record, and found the waiver and description torn off the writ. I was witness to the sheriff's deed and recollect the waiver of condemnation." The sheriff's deed also sets forth the existence of such a waiver as filed among the records of the court. This evidence, if believed, was sufficient to establish the fact of such a record and its loss. The only question then is, can parol testimony be admitted to supply such lost record? Justice Thompson, in the case of *Miltimore vs. Miltimore*, says that such testimony is admissible, and that since the cases of *Harvey vs. Thomas*, 10 Watts, 63; *Loughrey vs. McCullough*, 1 Barr, 503, and the Farmers' Bank of Reading, 6 Barr, 51, the question is not an open one. It follows, therefore, that we would be making terrible havoc among precedent decisions did we not affirm the ruling of the court below.

Judgment affirmed.

*Supreme Court of Pennsylvania.

APPEAL OF THE PENNSYLVANIA COMPANY FOR INSURANCE OF LIVES, ETC.

A testator having by his will limited the amount to be paid his daughter during her minority, and directed the accumulation to be incorporated into and form part of the body of the estate: *Held*, on application of the minor's guardian for an additional allowance, that the direction to accumulate was void under the act of April 18, 1853.

In re the Appeal of the Pennsylvania Company for the Insurance of Lives, etc., trustees, in the matter of an increased allowance to Annie D. Washington, a minor.

Certificate to Orphans' Court of Philadelphia. Opinion delivered February 2, 1874, by

GORDON, J.—The one question presented by this case is, to whom belongs the accumulations that have accrued over and above the amount which the will of Warner F. Washington directs to be paid for the maintenance of the minor? By the provisions of the will itself they form part and parcel of the estate, of which the minor is to have the entire interest during life from and after her arrival at the age of twenty-one. Then at her death the estate goes over to her appointees or children, etc. Now if the will be effective in this disposition of these accumulations, it follows that the answer of the trustee appellant is correct; he has not in his hand any estate from which her income can be increased, for it is conceded that the body of the estate cannot be trencched upon for any such purpose.

The appellee, however, insists that these accumulations by force of the act of 1853, vest in the minor, the enjoyment thereof only being suspended until her majority.

This brings us directly to the consideration of the aforesaid act of April 18, 1853. It provides that no person or persons shall, after the passage thereof, by any deed, will or otherwise, settle or dispose of any real or personal property, so, and in such manner that the rents, issues and profits thereof shall be wholly or partially accumu-

lated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor or testator; "that is to say, only after such decease, during the minority or respective minorities, with allowance for the period of the gestation, of any person or persons who under the uses and trusts of the deed, will, or other assurance directing such accumulation, would for the time being, if of full age, be entitled unto the rents, issues, interests and profits so directed to accumulate." All other accumulations are in express terms rendered void, except those mentioned in the first *proviso. It does seem to us that the true interpretation of this act is not hard to reach. In the first place, it allows accumulations only in favor of one class of persons, who are to be possessed of two qualifications: (1) They must be minors. (2) They must be such persons, who, if not minors when the deed or will goes into effect, will be entitled to take the rents and profits from which the accumulations are to arise. Any attempt to direct such accumulations into any other channel, renders the deed or will void *pro tanto*, and the rents and profits so appropriated pass to the person or persons who would have been entitled thereto, if such accumulation had not been directed.

If now, these accumulations go not to the minor, and it be conceded that such minor must in order to satisfy the terms of the statute be a beneficiary, it follows that the benefit may be so small as virtually to amount to nothing. If, for example, in the present instance the amount of eight hundred dollars per annum only belongs to Annie D. Washington, the minor, and we suppose the annual accumulation to amount to eight hundred dollars more, then certainly her allowance might have been four hundred, and the accumulation twelve hundred dollars per year. Thus we may by the same supposition reduce her beneficial interests to an annuity of ten dollars or of ten cents. This, however, would be a mere evasion of the terms of the statute, which is not to be tolerated.

In order to avoid a perversion of the statute, such as above stated, the appellant is constrained to construe the act in such a manner as to permit the accumulation during the period of minority of any minor selected for that purpose, whether it be the beneficiary or some one else.

In other words, this is the period allowed in which the estate may be permitted to accumulate, and when the period of majority arrives, this aggregated estate may be distributed according to the directions of the deed or will creating it, without any regard whatever to the person during whose minority it was accumulated.

But under this reading of the act, we must concede that cases may arise in which the person, during whose minority the accumulations accrue, may not be the one, who, if of full age, would be entitled to the rents, issue and profits so directed to accumulate, and hence we again come in conflict with the statute.

The error of the appellant arises from an attempt to incorporate the third clause of the British act into our Pennsylvania statute—a clause which the framers of our act were careful to exclude. A

[*Original Edition, p. 106.]

comparison of the two statutes will render the meaning of that of Pennsylvania very obvious, if, indeed, it were ever regarded as at all obscure.

In the English act there are four distinct cases or periods in which or during which accumulations were allowed. (1) During the life of the grantor or settler; (2) Twenty-one years from the death of grantor, settler or testator; (3) During the minority or respective minorities of any *person or persons who shall be living, or *en ventre sa mere* at the time of the death of the said grantor, etc.; And (4) during the minority or respective minorities only of any person or persons who under the uses and trusts of the deed, surrender, will or other assurance directing such accumulations would for the time being, if of full age, be entitled unto the rents, issues, profits, etc., directed to be accumulated.

Now, whatever of doubt may have arisen from the terms of this act, it was certainly not found in the fourth clause.

Jarman says (1 Jar. on Wills, 268 and 269), in commenting upon the case of *Halsey vs. Bannister*, 4 Madd. 275: "This decision makes the clause of the act which allows accumulations during the minority of any person who, if of age, would be entitled to the income, amount only to a mere saving or reservation of the rule of law, which so disposes of the income of minors, or rather of their surplus income, after providing for their maintenance." He says further, in the same connection, when speaking of the effect this doctrine may have upon trusts ordinarily introduced into provisions for maintenance during the minority of persons unborn at the testator's decease, which direct the unapplied surplus income to be added from time to time to the principal: "Such trusts, however, are distinguishable from the bequest in *Halsey vs. Bannister*, in this that they extend only to the unapplied surplus, and not to the entire income, and therefore approach more closely to the rule of law which accumulates the incomes of minors after providing for their maintenance; though they differ from that rule in regard to the destination of the accumulated fund, which the law gives to the minor himself, but which the express trust attaches to the principal fund."

Examine now our act of 1853, and it will be seen that it is almost a literal transcript of the British statute (39 and 40 Geo. III. c. 98), omitting the second and third clauses thereof. With this light, therefore, thrown upon the subject under consideration, and in view of these very significant omissions, it becomes to our minds certain that, with the exceptions stated in the first proviso, the legislature intended that there should be no accumulations of the estates of decedents, except in favor of those minors who should be beneficiaries under the deed or will by which the trust should be raised.

But we again revert to the clause of the statute which directs that these accumulations shall run only during the minority of those who, "if for the time being were of full age, would be entitled to the rents, issues, and profits so directed to accumulate." Now, it is a singular interpretation of the act, which, whilst it

[*Original Edition, p. 107.]

must admit of the starting of the accumulations with the minority of one who, if of full age, would be entitled to the rents, issues, and profits directed to be accumulated, nevertheless insists that such person may not be so entitled when such rents, etc., have been accumulated.

*It is not conceivable that the framers of this statute intended a construction so contradictory.

We must, therefore, conclude that that part of the will of Warner F. Washington, which directs the accumulations to be incorporated into and form part of the body of his estate, falls, and that such accumulations revert to and form part of the estate of Annie D., the only child of the said Warner F. Washington, who is the one thereunto entitled. The first exception raised to the ruling of the court below having been abandoned by the appellant's counsel, and the others having been considered in the preceding opinion, it only remains for us to say that we find no fault with the allowance made for the maintenance of the minor by the court below.

Appeal dismissed at the costs of the appellant.

SCHLATER vs. WINPENNY.

A was told in January that B's partnership was for one year. *Held*, that A had such notice of its dissolution as put him on inquiry.

Error to District Court of Philadelphia. Opinion delivered *March 2, 1874*, by

WILLIAMS, J.—There are three questions in this case:

1st. Whether the partnership of F. Schlater & Co., expired on the 1st of January or the 13th of February, 1869?

2d. If on the former day, whether the plaintiff below had notice of its dissolution?

3d. Whether John Clendenning was authorized to wind up the affairs and settle the business of the partnership after its dissolution?

I. The evidence shows that the plaintiff sold yarns after the 1st of January, 1869, to John Clendenning, who was authorized by power of attorney bearing date the 17th of January, 1868, "to buy and sell goods and merchandise," for and in the name of the firm, and that the price of these yarns was included in the notes sued on. The plaintiff himself testified that "these notes were given for a balance of account and are renewals of others." If, then, the partnership expired on the 1st of January, 1869, and the plaintiff had notice of its dissolution, it is clear that he is not entitled to recover that portion of the notes embracing the price of the yarns sold after that date, even if John Clendenning, by whom they were given, was authorized to settle the business of the partnership. It is, therefore, a material question, whether the partnership expired on the 1st of January, 1869, or was dissolved on the 13th of February thereafter.

Clendenning was examined as a witness for the plaintiff, and testified that the partnership continued until the 13th of February,

[*Original Edition, p. 108.]

1869, and that it was then dissolved. On his cross-examination he said that he did not tell Benj. Rowland, Jr., that this firm expired January 1, 1866; and *that he did not tell him that all coal charged to F. Schlater & Co., after that date, must be recharged to himself, as the firm expired January 1, 1869; and that the coal was not so recharged, and he did not pay the bill for the same. The defendant called Rowland, who testified: "We furnished coal to F. Schlater & Co. In January and February, 1869, we charged coal to F. Schlater & Co. and sent the bill to Schlater & Co." The defendant then offered to show that Clendenning gave notice to the witness that this partnership ended January 1, 1869, and that as to the coal charged to F. Schlater & Co., after January 1, 1869, Clendenning said that it was to be recharged to John Clendenning; and that it was so recharged and paid by Clendenning, and that this notice was given before the date of these notes. The plaintiff objected to the offer and the court sustained the objection. The defendant then offered to prove by the witness the declarations of Clendenning that the firm of F. Schlater & Co. was dissolved January 1, 1869. This offer was objected to, unless the plaintiff was present and had notice of the dissolution, and the court sustained the objection and excluded the offer. If anything in the law of evidence can be regarded as settled, it is, that the credit of a witness may be impeached by proof that he has made statements out of court contrary to what he has testified at the trial. The principle is too familiar to need the citation of any authority in its support. The matter in regard to which it was proposed to contradict the witness was material and relevant to the issue, and his attention was called to the person and the particular circumstances involved in the supposed contradiction. The offers should, therefore, have been admitted, and the court fell into a palpable error in rejecting them.

II. If the defendant informed the plaintiff in January or February, 1868, that the partnership was for one year, and that it ended on the 1st of January, 1869, then the latter had such notice of its dissolution as should have put him upon inquiry. He had no right to sell goods to Clendenning on the credit of the firm after that date without ascertaining that the partnership still continued.

III. The dissolution of the partnership, whether it terminated on the 1st of January or the 13th of February, 1869, undoubtedly operated as a revocation of the power of attorney authorizing Clendenning to conduct its business, and, unless he was authorized by the members of the firm to settle the business of the partnership after its dissolution, he had no authority to give the notes in controversy. On his cross-examination he said: "I exercised no powers except under the letter of attorney, which was for the business of F. Schlater & Co.;" but on his re-examination he said: "I had authority to wind up the affairs of the firm, after dissolution." In saying this he may have supposed that under the power authorizing him to conduct the business of the firm he had authority to wind up and settle its affairs; or he may have so testified because he *was expressly authorized by the members of the firm to settle the business of the

[*Original Edition, pp. 109 and 110.]

partnership after its dissolution. But be this as it may, it is clear that the defendant had the right to contradict the witness by showing that he had no power as attorney in fact of the firm, after the dissolution thereof, to wind up its affairs, and, therefore, the court erred in sustaining the objection to the offer unless followed by proof of notice to the plaintiff.

The authority conferred by the power of attorney to conduct the business of the firm, as already suggested, ceased with the dissolution of the partnership, and if the plaintiff knew that the firm was dissolved when the notes were given, as it is manifest that he did, it was his business to see that Clendenning had authority to give them.

It needs no argument to show that the defendant was not bound by the entries made by Clendenning, or by his direction, in the partnership books after the dissolution of the firm; nor were they evidence against him, unless it was shown that he had assented to them.

Judgment reversed and a *venire facias de novo* awarded.

District Court of Philadelphia.

ROHRMAN vs. STEESE.

If an owner interferes with a contractor, and subjects him to his command, the contractor is not liable for injuries to his work occasioned thereby.

Rule for a new trial. Opinion delivered March 21, 1874, by

BRIGGS, J.—The defendant put an additional story on his house, and employed the plaintiff to put the tin on the roof. The plaintiff accordingly put the tin upon the roof at the defendant's direction before the brick walls had been run up. He did this upon a notice from the defendant that unless he proceeded with the work the next day the defendant would employ another person to tin the roof. After the roof was tinned, and before it was painted, the bricklayers ran up the wall, and in doing so dropped bricks upon the tin, cutting it in several places so badly that it leaked, and greatly damaged the interior of the house. After the brick work was finished the tinner painted the roof and delivered it to the defendant as completed, first soldering up the holes which had been cut by the bricks being dropped upon the tin. The plaintiff filed his lien for the tin and tin work, and issued a *scire facias* thereupon to recover therefor. At the trial the defendant's counsel took the position that the damage to the building from the leakage in consequence of the tin being cut should be deducted from the plaintiff's claim, and now, upon this rule for a new trial, he presses with great force, that the plaintiff, and not *the defendant, was liable for the mishaps to the roof until it was completed by being painted and delivered to the defendant.

This, as a general proposition, is undoubtedly correct, and would be unanswerable had this building been erected as buildings generally are, with the walls up before the roof is put on. Considering, however, that the tin was put on at this exceptional time, at the com-

[*Original Edition, p. 111.]

mand of the defendant, under circumstances of extra hazard, from the accidents injuring the roof, we do not think that the plaintiff's duty should be measured by the rule contended for so earnestly by the defendant's counsel. The plaintiff's case is rather an exception to the rule, and hence should not be judged by it. The defendant's command gave the plaintiff no alternative but to proceed with the work at once or to abandon it. Surely the plaintiff should not be answerable for accidents to the roof, when the work was done not by the contractor at his own time and pleasure in the performance of his contract, but at the special command of the defendant.

We do not understand the rule to be that an owner is exonerated from liability even where there is a contract, when he interferes with the contractor, and subjects him to his command. In such case the contractor, instead of remaining master of the contract, is subordinated to and becomes the servant of the owner; and this shifts the liability upon the owner, which otherwise would remain with the contractor.

Rule discharged.

SHEETZ *et al.* vs. HANBEST.

The act of 1869 disqualifies a party as a witness when the other party is dead, although he would not have been disqualified prior to that act.

Briggs, J., and Thayer, J., concurring; Hare, P. J., and Mitchell, J., dissenting.

Rule to take off nonsuit. Opinion delivered March 21, 1874, by

BRIGGS, J.—The plaintiffs are creditors of John D. Lentz, and are claiming the fund in court as against the defendant's executors, the holders of Lentz's judgment note to Hanbest for \$10,000. The plaintiffs allege *inter alia*, that this note was obtained by Hanbest from Lentz by fraud. An issue having been found to determine that question, the plaintiffs at the trial called Lentz as a witness. The defendants objected to his competency upon the ground that he was rendered incompetent by the act of April 15, 1869, and Hanbest's death. This objection was sustained, and the plaintiffs having no further testimony a judgment of nonsuit was entered.

Whether this was right is now the question, and upon this question (Judge Lynd being absent from sickness) the court stand divided, two members being of the opinion that Lentz was not affected by the act of 1869, inasmuch as he would have been a competent witness had that act not been passed; under the doctrine of the cases of *Galway's Appeal*, 10 C. 242; *Smith's Executors vs. Wagenseller*, 9 H. 491; *Ferree vs. Thompson*, 2 P. F. S. 353, while the two remaining members of the court are of the opinion that the act of 1869 not only enabled Hanbest to testify if living, but upon his death it disabled Lentz, the surviving party to the note, from testifying. His incompetency is not put upon the ground of interest, but of policy. It being impolitic to permit one party to a contract to give his version when the lips of the other party are sealed in death. In construing the act of 1869, in *Karns vs. Tunner*, 16 P. F. S. 305, the present chief-justice uses this expressive language: "Where one of two parties to a transaction is dead, the survivor

[*Original Edition, p. 112.]

and the party representing the deceased party stand on an unequal footing as to knowledge of the transaction occurring in the lifetime of the deceased. The enacting clause had opened the lips of all the parties, but when death came it closed the lips of one, and even-handed justice required the mouths of both to be sealed."

As bearing upon this view the cases of *Graves vs. Griffen*, 7 H. 176; *Alum's Executors vs. Carroll's Administrators*, 17 P. F. Smith, 68; *Watts vs. Leidig*, 29 Legal Intelligencer, 1872, page 293, are also in point.

A bill of exceptions being sealed, without doing more than to state the views of the respective divisions of the court, the case is respectfully submitted to umpirage of the Supreme Court.

Rule discharged.

HARE, P. J., and MITCHELL, J., dissenting.

The act of 1869 is entirely an enabling act. The proviso excepts from the operation of the act certain cases, as to which the law remains as it was before the passage of the statute. It is conceded that the witness would have been competent at common law: *Ferree vs. Thompson*, 2 P. F. S. 353; and we are of opinion that nothing in the act disqualifies him. There is no decision of the Supreme Court reported, in which any witness has been held incompetent who would have been competent before the act of 1869.

*Supreme Court of Pennsylvania.

LAUBACH vs. LAUBACH.

The question whether the stock was tendered to defendant within a reasonable time after it was discovered to be worthless, the transaction being between parties unaccustomed to stock dealing, was left to the jury. *Held*, not to be error.

Error to Common Pleas of Lehigh County. Opinion delivered March 23, 1874, by

GORDON, J.—This case is similar in all its general features to that of *Laubach vs. Laubach*, in which the opinion of this court was delivered by our brother Sharswood on the 27th of March, 1873. In that opinion the eighth and ninth exceptions of the present case are fully met and disposed of. The questions put to the defendant were relevant and material.

He denied having sold the stock to the plaintiff, and produced his son Frank to prove that he was the one through whom the sale was effected, and that he was the agent who controlled this mining stock in that neighborhood. By this kind of proof he undertook to convince the jury that he had nothing whatever to do with the transactions. In view of this, it was certainly proper to inquire of him if he had not said that he had reserved twenty thousand dollars of this stock for the Laubach connection, that he had represented it as good stock, paying large dividends, and that he would guarantee it. This evidence was admissible, not indeed to prove what were his contracts with others (and the learned judge of the court below carefully so instructed the jury), but to show that he

[*Original Edition, p. 118.]

was the agent for the sale of this stock, and also for the purpose of laying the ground for his contradiction. Neither can we discover error in the ruling of the court on the eight exceptions raised on the questions put to Frank Laubach. All these were designed to test his knowledge of the transactions about which he swore, to show his complicity with his father to defraud the plaintiff, and to lay the ground for his contradiction.

The exceptions to the charge all revolve about one point, and we have no doubt that the court's solution of that point was correct. The complaint is that the court permitted the jury to find whether or not the tender of the stock was made to the defendant in a reasonable time after the discovery that it was worthless, instead of determining that question as a matter of law. But in face of the evidence, the court could not refuse to do so. This was not a transaction between dealers in stocks, who buy and sell with reference to the almost daily rise or fall in the market, but the dealing between the plaintiff and defendant had reference to the stock as a permanent investment, and to what it would produce in the way of annual interest. Looking at the matter from this stand-point, the stand-point of the parties, and certainly one year was not an unreasonable time in which to ascertain what interest the stock would pay. If there was a longer delay, one which *prima facie* was unreasonable, it was for the jury to determine whether or not that delay was produced by the acts of the defendant, and if, as the jury found, he persuaded the plaintiff to wait from time to time, and thus test this barren subject still further, it is ungracious in him now to complain of a result produced by himself.

Judgment affirmed.

ELLIOTT vs. THE CITY OF PHILADELPHIA.

The city of Philadelphia is not responsible for the negligence of its police officers while engaged in the enforcement of a city ordinance.

Elliott vs. The City, 7 Phila. Rep. 128, Thayer, J., affirmed.

Error to the District Court of Philadelphia.

The case below was an action brought by William B. Elliott, plaintiff in error, against the city of Philadelphia, defendant in error, for the recovery of the value of a horse, the property of the plaintiff in error.

The circumstances were these:

The servant of the plaintiff in error, in February, 1869, was driving the latter's horse along Broad street, in the city of Philadelphia, when he was arrested by certain police officers of the city for alleged furious and reckless driving, and taken before an alderman for the purpose of hearing the case. The horse and wagon were at the same time taken by the police officers to the office of the alderman, and while the case was being heard, the horse, which had been left in charge of a boy, by the police officers, ran away, jumping into the Delaware river at Shackamaxon street wharf, and was drowned.

The demurrer to the plaintiff's declaration alleging "no cause of

[* *Original Edition*, p. 114.]

action," was sustained by the court below. The opinion, which was delivered by his honor, Judge Thayer, is reported in 7 Philada. R. 128.

Plaintiff in error thereupon sued out this writ of error, and the case was argued in January Term, 1873, and the judgment of the court below sustained by an equally divided court.

The case was re-argued in January Term, and the following was the opinion of the court:

Opinion delivered March 9, 1874, by

AGNEW, C. J.—The opinion by Judge Thayer is such an ample discussion of the question in this case that it is unnecessary to do more than affirm the judgment upon it. The case is distinguishable entirely from that of the *City vs. Gilmartin*, 21 P. F. S. 140. It was decided upon the ground of agency, and it was therein expressly said: "Thus a mere statement of the facts discloses the relation of principal and agent in reference to the city water works, and not that of ordinary corporation officers *performing merely municipal functions." This is plainly the distinction between the two cases, the police officers in the present case having acted merely in their official character when arresting the plaintiff for a breach of the peace. In the *United States vs. Hart*, 1 Peters' C. C. R. 390, Judge Washington held, that driving a mail stage at a furious rate through the streets of Philadelphia, was a breach of the peace, and that, notwithstanding the act of congress against stopping the mails, a constable was authorized at common law, without a warrant, to prevent the peace from being broken, by arresting the driver.

Judgment affirmed.

KIMMEL *et al.* vs. WAGNER *et al.*

Where the intent is clear, a devise to an institution under a wrong or abbreviated name is good.

Error to the Common Pleas of Schuylkill County.

PER CURIAM. Filed March 9, 1874.

This will is very inartificially drawn, and suffered no doubt in its translation from the German. Yet we think it is substantially sufficient to carry the title to the land in controversy to the "Board of Trustees of the German Eldership of the Church of God," the corporation intended by the testator. The sixth section of the charter provides that no misnomer of the corporation shall defeat any gift or devise to it, provided the intent of the party making it sufficiently appear on the face of the will. Clearly the name used in the will, "the German Eldership," marks the testator's intent with sufficient precision to enable us to conclude from the face of the will that he meant the corporation above named. The testimony offered was not to change the name of the devisee mentioned in the will, but to show that the corporation was ordinarily named by others as it was by the testators, and thereby to identify the corporation more conclusively. It is competent to show that a

[*Original Edition, p. 115.]

person who has a full name is known by a part of it. If this were not so, those who use initials instead of their full name, would be often excluded from the ownership of property. The use intended for the work of God and the poor is sufficiently explained by the after part of the will to give it effect, the poor being described, and the preacher of the congregation being designated as the person to receive the remainder of the sum needed for his support, not provided for by the congregation.

Judgment affirmed.

***TiOGA COUNTY vs. SOUTH CREEK TOWNSHIP.**

An order of removal of a pauper not appealed from, is final and conclusive as to the settlement of the pauper.

The phrase, "no interest or policy of law," in the act of 1869, *held*, to mean that which, before the passage of that act, excluded parties from testifying in their own suits, or where they had any interest in the subject matter in controversy.

Appeal from the Quarter Sessions of Bradford County. Opinion delivered *March 23, 1874*, by

GORDON, J.—This case might have been well decided on the ground that the order of removal of 16th December, 1871, never having been appealed from, was final and conclusive as to the settlement of the pauper. That order was well executed by his delivery to the commissioners of Tioga county, though directed to the overseers of Covington township, because the commissioners represented the several poor districts of that county. Instead of returning the pauper to South Creek township, they should have appealed to the next Court of Quarter Sessions. Not having done so, the order became conclusive and amounted to a final adjudication: *Sugar Creek vs. Washington*, 12 P. F. S. 479.

It was, however, properly decided in the court below upon the evidence. The determination of the case depended upon the question of the admissibility of the testimony of the parents to bastardize their child born to them after wedlock. Exclude this, and nothing is left to controvert the fact that the settlement of the pauper was in Covington township, for that was the settlement of his father, and there is no evidence whatever going to show that he had gained a new one for himself.

That issue born in wedlock, though begotten before, is presumptively legitimate, is an axiom of law so well established, that to cite authorities in support of it would be a mere waste of time. So the rule that the parents will not be permitted to prove non access for the purpose of bastardizing such issue, is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact, that it reveals immoral conduct upon part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child, is a proposition which shocks our sense of right and decency, and hence the rule

[*Original Edition, p. 116.]

of law which forbids it. But the counsel for the appellant insists that the case is within the purview of the act of 1869. The language of that act at first blush might seem to include a case of this kind. "*No interest or policy of law shall exclude a party or person from being a witness in any civil proceeding.*" The words we have italicized are those relied upon to support the appellant's theory. But when we come to consider the fact that "*the interest or policy of law*" which the legislature had in view in passing that act, was *that which, before that time, excluded parties from testifying in their own suits, or where they had an interest in the subject matter in controversy, it becomes obvious that a case such as the one under discussion was not in the legislative mind when that act was passed. It would, therefore, be an unnecessary and violent construction of the statute to make it include a "policy of law" wholly different from that under contemplation when it was framed. We therefore, without hesitation, adopt the view taken of this question by the learned judge of the Court of Quarter Sessions, and agree with him that the act of 1869 was not intended to abolish a valuable rule of law founded in good morals and public decency.

The testimony of Amos Houghland, the father of the pauper, to establish duress in his marriage was properly disregarded. He was thoroughly contradicted by all the witnesses who were present at the ceremony, and it would have been gross error to have treated the marriage as void upon evidence so unreliable.

Finding no error in the ruling of the court below the judgment is affirmed.

SCHOFIELD vs. SIMPSON.

A direction to the jury to find a verdict "for such damages for the breach of the contract as you may find on the testimony he (the plaintiff) is entitled," is erroneous in leaving the facts and law to them without any instructions to guide them.

Error to the District Court of Philadelphia. Opinion delivered February 16, 1874, by

GORDON, J.—In the case of *Gillmore vs. Hunt*, 16 P. F. S. 323, this court reversed the court below for an instruction very similar to that in the case in hand. Justice Williams, delivering the opinion of the court in that case, says: "This was leaving the jury to find such damages as they thought proper, without giving them any rule or standard for their guidance." The learned judge of the District Court says, in his charge to the jury: "If on the other hand you believe the defendant's story, your verdict should be for such damages for the breach of the contract as you may find on the testimony he (the plaintiff) is entitled to."

We hold this to be misdirection, inasmuch as the court, taking the contract and its breach for granted, left the jury to construe that contract from the facts given, and determine in what the breach consisted, and then settle the measure of damages after their own ideas, and according to such rule as they might adopt for the occasion. In every parol contract there are two sets of essential elements, facts and law. Giving the facts then, with the help of

[* *Original Edition*, p. 117.]

certain legal principles, we construe the contract, and determine its qualities. To find the former is the proper work of the jury, but the application of the latter is the duty of the court, and when the court throws that duty over upon a jury, it is not only an *omission, but it is a misdirection, for it requires that of the jury which is not properly within its province. It is so also with reference to the damages; the court and jury have separate and distinct duties to perform. It was, therefore, erroneous for the court to permit the jury to adopt any set of rules that to them might seem proper to govern their finding. The result of this is apparent. According to the defendant's testimony, he was liable only for fifty dollars, unless Dickson, on demand, refused to pay his part of the expenses. This was the condition upon which his assumption was founded. There was, however, no evidence of any such demand and refusal, and yet the jury found a verdict for the plaintiff in the sum of one hundred and twenty-one dollars and twenty-five cents. Now upon the hypothesis that they adopted the defendant's testimony, and we are bound so to presume, the jury either found a contract not warranted by the testimony, or they gave vindictory damages. In either case they were wrong. As from the record this error appears to have originated through the inadvertence of the court below, we, therefore, reverse the judgment, and order a new *venire*.

MASON'S PETITION.

The act of 1842 abolishing imprisonment for debt, does not prevent bail from another State arresting his principal in this State, upon a bail piece, and taking him out of the State.

In re petition of Addison G. Mason for writ of habeas corpus. Error to Common Pleas of Luzerne County. Opinion delivered March 23, 1874, by

AGNEW, C. J.—It is well settled that bail from another State may arrest his principal in this State upon a bail piece, or depute another to do it, and take him out of the State, for the purpose of surrendering him in discharge of his recognizance: *Holsey vs. Novillo*, 6 Watts, 402. But it is objected that the act of 1842, abolishing imprisonment for debt, has wrought a change in this respect, and operates as an exoneration, for which *Kelley vs. Henderson*, 1 Barr, 495, is cited as authority. This is true as to bail at the time of the passage of the act, who then had their principal in custody, in a case where the non-imprisonment law cut up the right of imprisonment by the root. But certainly it is not true where the right of arrest remained under any of the exceptions in the act of 1842. Precisely so must we view an arrest by the bail under a bail piece issued in an action in another State. The presumption is that the Supreme Court of New York acted rightly in requiring bail in the action there. We certainly ought not to inquire into the legality of his arrest there, and discharge the petitioner from the custody of his bail. Our order would be no justification to the

[*Original Edition, p. 118.]

bail in an action against him on his recognizance. The relation of the States to each other requiring mutual co-amity, and the *provision in the constitution of the United States, that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, forbid an inquiry into the cause of action in New York; one which we could not conduct with safety to the bail, or credit to ourselves. We must take it for granted that the bail was rightly demanded, and the defendant committed to the custody of his bail in conformity to the law of New York. This being so, the bail has the right to take his principal here and remove him to New York, in order to comply with his undertaking. It is an ungracious act on part of the principal to fix his bail for the demand; as he must well understand that the non-imprisonment law of Pennsylvania cannot change the *status* of his case in New York; and that our order of discharge would be ineffectual to relieve the bail.

The order of the Court of Common Pleas of Luzerne County remanding the petitioner into custody is affirmed.

Court of Common Pleas, Snyder County.

KRAMER vs. KRAMER'S ADMINISTRATORS.

Plaintiff, who inherited certain real estate, in 1837, from her father, married before 1848, and in 1852, under the proviso of the 48th section of the act of March 29, 1832, made a declaration authorizing her share of the real estate, which had been partitioned in 1851, to be paid to her husband without security; the husband died in 1871, and plaintiff sued his estate to recover the amount paid him under said declaration. *Held,*

1. That the husband was not a trustee, and the payment of her share in partition was absolute.
2. The married woman's act (April 11, 1848) did not impair the vested interest of the husband, although partition did not take place until 1851.
3. Where the wife acquires the estate after April 11, 1848, the act of March 29, 1832, section 48, is inoperative.

Opinion of the court delivered by

JUNKIN, P. J.—This plaintiff was a daughter of Abraham Blosser, who died in 1837, and she inherited from him certain real estate. In 1840, she married Benneville Kramer, and in 1851, her real estate was partitioned in Orphans' Court of Union County, or, rather, her father's real estate was so partitioned, and being accepted by one heir, she, in conformity with the practice in that county, received a bond for her interest of \$2,700. On September 16, 1852, she made a declaration under the 48th section of the act of March 29, 1832, authorizing her share to be paid to her husband without security, which declaration, etc., was duly filed the same day. The husband received \$2,000 on the bond, and died in 1871; and she now sues her deceased husband's estate to recover the amount so received *by him, treating him as a trustee. This act has been in force forty years, and this is the first attempt to turn him into a trustee under said section, showing plainly that the profession have treated the payment of the wife's share in partition, when paid to him under the declaration, as absolute.

[*Original Edition, pp. 119 and 120.]

In *Yohe vs. Barnett*, 1 Binney, 365, it was held that the husband could take her share in partition as personalty. This was unsatisfactory to the profession, and hence the 48th section of act of 29th March, 1832, which required him to give security for the repayment of the principal to the wife if she survived him, if not, to her heirs; and if he was unable to give this, then a trustee was appointed. "Provided always, That, if the wife being of full age, on a separate examination, the husband not being present, should declare, etc., . . . that she does not require such moneys to be secured, . . . then and in such cases the husband shall not be required to secure the said moneys in manner aforesaid."

It seems clear that it was intended by this section to allow the principle of *Yohe vs. Barnett* to operate in all cases where the wife made the declaration. The act required the judge to explain to her "the legal effect of the declaration," and for forty years they have discharged that duty by telling her that the effect was to carry from her forever all her interest: *Walters' Estate*, 2 Wharton, 249, and *Byer vs. Resser*, 5 W. & S. 501, seem to assume that such was the effect.

Then as these parties married before the married woman's law was passed (11th April, 1848), the husband's vested interest was not impaired by said act; and although partition did not take place until 1851, still the act of 1832 would remain in force to meet such cases: *Burson's Appeal*, 10 Harris, 164; *Stehman vs. Huber*, 9 Ib. 260; *Boose's Appeal*, 6 Ib. 392; *Bachman vs. Chrisman*, 11 Ib. 162; *Mann's Appeal*, 14 Wright, 381. In all cases where the wife acquires the estate after the 11th April, 1848, the act of the 29th March, 1832, 48th section, is inoperative.

It results from this view that the plaintiff cannot recover.

*Court of Common Pleas, Schuylkill County.

SHOMO vs. ZEIGLER.

A verdict of a jury will not be set aside for the misconduct of a juror in conversing about the cause on trial with a witness before or during the trial, when no improper influence or bias is shown, unless such misconduct was caused by a party to the suit, or his agent, or by his representations, and proof of the bias must be clear and manifest.

The general rule in Pennsylvania is that all papers given in evidence in the trial of the cause, except *depositions*, are to be sent out with the jury.

A certified record of bankruptcy offered in evidence during the trial, through which the plaintiff claims the land, may be sent out with the jury, even though there are depositions attached to the proceedings relative to the bankruptcy, but immaterial to the controversy. Such depositions stand on a different footing from ordinary depositions, for the record cannot be cut up and mutilated.

It is the duty of counsel to object to papers before they are admitted to the jury-room.

Rule to show cause why a new trial should not be granted.

Opinion delivered April 13, 1874, by

WALKER, J.—There are four reasons assigned for a new trial, viz.:

1. The verdict was against the law and the evidence.
2. The court erred in its construction of the agreement of the 26th February, 1863.
3. The jury were improperly interfered with.

[* *Original Edition*, p. 121.]

4. That papers were sent out with the jury that were not in evidence, to wit, the entire record in bankruptcy, including depositions that had been previously refused the defendant to use.

As to the first reason: There were disputed facts in this case, such as the defendant's possession, the wife's title, and other facts, which were properly submitted, and which the jury found: *Cross vs. Carey*, 25 Ill. 562. We see nothing in this for disturbing the verdict.

2. The construction we put upon the agreement referred to, was that it was an exchange of properties, and amounted to a sale. By the terms of the agreement after performance of the covenants, and possession taken, the equitable or beneficial title passed to Zeigler, and through him by the assignee's sale to the purchaser, even though the legal title remained in Turner, and upon his death his interest under the agreement would descend to his heirs as money, if any part of the consideration remained unpaid, and not as land. After the execution of the agreement, Turner held the legal title to the premises as trustee for Zeigler; *Garrard vs. Lantz*, 2 Jones, 194; *Morgan vs. Scott*, 2 C. 51; *Schock vs. Bankes*, 1 Leg. Chron. 218. We think this is correct. This point has not been pressed by the learned counsel for the defence.

The third reason is improper interference with the jury.

The court may set aside the verdict of a jury for misconduct, and where it is prejudicial to the losing party, will do so. But the granting of a new trial, like the granting of a continuance, or taking off of a default, *or opening a judgment, rests in the sound discretion of the court: 2 Graham & Waterman on New Trials, 43 to 50; *Grey vs. Beap*, 11 Pick. 189.

In the present case, the testimony of one of the jurors is that after the cause had been closed, and before the charge of the court, he met William J. Smith, one of the plaintiff's witnesses, in the basement of the Mortimer House, and there had a conversation with him relative to the case on trial. The juror says that he don't recollect all that Smith said, but what he does recollect is, that the witness said he had lost a great deal of money by the operation, speaking of the long case. He afterwards testifies, on cross-examination, that Smith was complaining about the length of time he was kept away from his home. This is all that he can recollect. The juror admits that he commenced the conversation with Smith, and yet he says that he did not wish to talk with any one about the case. In another place he says he does not recollect what was said about the cause. The juror's evidence is unsatisfactory, confused, and conflicting. His conduct is open to censure, and must be condemned. The practice of jurors talking about causes which they may be called to determine, is not only highly reprehensible, but contemptuous, and subject to admonition. Jurymen should be *omni exceptione majores*, and, as the Supreme Court say, "their minds should be as white paper" with reference to the cause they are trying. But when a verdict is sought to be set aside, it must be on other ground; their misconduct is not, in itself, a sufficient reason for a new trial, unless occasioned by the prevailing party, or some one on his behalf, or by his arrangement (*Pettibone vs. Philips*, 13

[*Original Edition, p. 122.]

Conn. 445), or there must be some bias or prejudice created, and the evidence of it should be full and clear: *Stone vs. The State*, 4 Humph. 27; *Mullen vs. Cottrell*, 41 Miss. 292.

In *McCausland vs. McCausland*, 1 Yeates, 372, the court held that where a juror betted on both sides of the case, and declared previously his opinion in favor of the plaintiff, though his conduct was highly censurable, no bias was shown, and the expression of opinion was a subject of challenge, and a new trial was refused. See, also, *McCorkle vs. Binns*, 5 Binney, 340.

In *Blaine vs. Chambers*, 1 S. & R. 169, it is held, that it is gross misconduct for any person to speak to a juror, or for a juror to permit conversation concerning the cause after he is summoned and before verdict. There the brother-in-law of the lessor of plaintiff conversed with one of the jurors concerning the cause, before and after he was sworn. It was contended that the plaintiff was guilty of no misbehavior, and should not be affected by the misconduct of another, and that the court will not grant a new trial, except for the misbehavior of a party: *Grovenor vs. Fenwick*, 7 Mod. 156; *George vs. Pearce*, 7 Mod. 31. Judge Yeates held "that the person who attempted to labor the jury merited the most severe punishment, as such conduct poisons the first source of justice." But, as the verdict was conformable to the justice of the case, a new trial was denied.

In *Richter vs. Holbrooke*, 7 S. & R. 458, a verdict was set aside for improper conduct of the plaintiff with the foreman of the jury, for in such *case the court will not stop to inquire whether the juror was influenced or not. See, also, *Fenden vs. Den*, 4 Harr. 76; and in *Cowperthwait vs. Jones*, 2 Dallas, 56, the court say when the conversation is not with the party, there must be a reasonable certainty that actual and manifest injustice is done. So a verdict will not be set aside for a juror's misconduct, unless it is prejudicial to one or the other of the parties: *Crane vs. Sayre*, 1 Halsed (N. J.); *Harrison vs. Price*, 22 Ind. 163. It furnishes no legal ground for disturbing a verdict, that one of the jury has been tampered with, unless the act complained of be done by one of the parties or his agent, or by his consent and management: *Bishop vs. Williamson*, 2 Fairfield (Me.), 495. Verdicts ought not to be set aside on account of loose expressions of one, or even of a few of the jury thrown out casually and without being fully understood and explained: *Lamb vs. Sulters*, 3 Brevard, 130; *Steward vs. Small*, 5 Miss. 525; *People vs. Boggs*, 20 Cal. 432; *Hudson vs. State*, 9 Yeager, 408; *Shea vs. Lawrence*, 1 Allen, 167; *White vs. Wood*, 8 Cushing, 413; *Wiggins vs. Coffin*, 1 Story, 1. The weight of authorities is as stated, but there are some decisions against this view. See *Durfee vs. Eveland*, 8 Barb. Sup. Ct. 46. Where the jurors talked with bystanders, before rendering their verdict about the cause; that it was a lengthy suit, an expensive litigation, and about the value of the land, it was held misconduct on the part of the jurors, but not of a nature to set aside the verdict: *Hager vs. Hager*, 38 Barbour, 92, and authorities cited by the court. Where a jurymen said to a witness of the plaintiff that "they would throw the costs upon the defendant, of course," and the witness said "they

could, of course," and the verdict was for the plaintiff, on motion for a new trial it was held, that although such conduct was a violation of the juror's public duty, yet it showed no bias or prejudice, and was not sufficient to grant a new trial: *McIlvaine vs. Wilkins*, 12 N. H. 474; *Pettibone vs. Philips*, 13 Conn. 445. Though the rule is the same in civil and criminal trials (2 Graham & Waterman on New Trials, 416), yet more leniency is exercised in the latter. See, also, *State vs. Andrews*, 29 Conn. 100; 2 Graham & Waterman on New Trials, 480 to 491. As the conversation of the juror was not with the plaintiff but with his witness, and as it is admitted by the counsel for the defence that it produced no improper influence, it furnishes no cause for setting aside the verdict, under the authorities just cited.

4. Was there error of which the defendant can complain in allowing the record in bankruptcy to go out with the jury, containing some depositions relative to the bankruptcy and which the defendant had unsuccessfully endeavored to get before the jury?

The whole record was offered and received in evidence to establish the bankruptcy of E. W. Zeigler, through whom the plaintiff claimed by deed from his assignee. This was absolutely necessary for his case.

On a former trial of this very cause only a portion of the record was offered in evidence, and because it was not certified as full and entire it was ruled out at the instance of the defendant, and the plaintiff suffered *a nonsuit. Now it is full and entire, and the objection is that it contains foreign matter improper for the jury to take out with them. The record could not be divided without mutilating it and entirely destroying its validity. There was no prayer by the defendant to expunge the foreign matter, and if there had been it is doubtful whether the court could cut up the record and send out only a part. It must be the whole record or none. If we were to disturb the verdict for that reason now our rulings would not only be inconsistent but haphazard. This is our reason why the whole record is evidence. Now for the authorities: The rule in Pennsylvania is that all papers given in evidence during the trial of the cause, except depositions, are to be sent out with the jury: *Hendel vs. The Turnpike*, 16 S. & R. 97; *White vs. Bisbing*, 1 Yeates, 400; *Alexander vs. Jameson*, 5 Binney, 238; *Hamilton vs. Glenn*, 1 Barr, 342; *Mullen vs. Morris*, 2 Barr, 85; *Corson vs. Watson*, 4 Phila. Rep. 88; 1 Troubat & Haly, 578; *Iron and Coal Co. vs. Rogers*, 15 P. F. S. 416; *Taylor vs. Sorshy*, 1 Walker, 97; *Odd Fellows' Hall vs. Masser*, 12 Harris, 507; 2 Graham & Waterman on New Trials, 331 to 335. But a written statement filed during the trial should not be given in evidence or go out with the jury: *Bellas vs. Lloyd*, 2 Watts, 401; *Hamilton vs. Glenn*, 1 Barr, 340. But in the present case the depositions were attached to the record, and could not be separated, and *ex necessitate rei*, if the record be evidence at all, the jury are entitled to the whole record.

The objection that it contains foreign matter, irrelevant to the issue, is applicable to other papers. Thus a deed having a description of the property in dispute may also contain descriptions of

[*Original Edition, p. 124.]

other lands. Books of original entries given in evidence frequently do contain other accounts. The exemplification of a record of judgment is evidence which a jury may have, although there may be some irrelevant matter in it: *Schuylkill and Dauphin vs. Jones*, 8 P. F. S. 304; *Alcott vs. Boston Steam Mill Co.*, 11 Cushing, 91. In none of these instances is it improper for a jury to examine the papers. Where a jury by mistake took out with them a deposition, part of which was inadmissible, but that part was irrelevant and immaterial to the issue, it was not a sufficient ground for a new trial: *Lonsdale vs. Brown*, 4 W. C. C. Rep. 148; 2 Wharton's Dig. 532, § 881. Where the question is as to the ownership of goods, it is no objection to admit a printed catalogue of goods to go to a jury, that certain of these had been marked by the plaintiff as his property: *Stricker vs. McMichael*, D. C. C. P., 7 Leg. Int. 154. So, in an issue in the Orphans' Court to try who were the heirs of John Alexander, deceased, a manuscript book found in the trunk of the deceased was offered in evidence and allowed to go out with the jury, and it was held that there was no distinction between sealed and unsealed instruments in this respect: *Alexander vs. Jamieson*, 5 Bin. 238. In *Comth vs. Sennett*, 5 Wr. 161, the schedule, statements and affidavits not being evidence of loss, they could not be read or sent to the jury, and in *The Marine Ins. Co. vs. Hodgson*, 6 Cranch, 206, *ex parte* depositions taken in another case were not evidence for a jury. But where a record is given in evidence without objection to the court and jury, it is error to refuse to permit it to go out with the jury: *Hendel et al. vs. Turnpike Road*, 16 S. & R. 92. In an action for malicious prosecution it was held proper to send out with the jury the information made by the defendant. Gibson, Chief-Justice, says: "That document was not a deposition, but an indispensable part of the case in evidence by the plaintiff himself, and as such it does not fall within the rule which excludes a deposition from the jury room:" *Seibert vs. Price*, 5 W. & S. 440.

In *Sholly vs. Diller*, 2 Rawle, 177, it was decided that a paper purporting to be a will, and the probate and letters attached, "if they were properly admitted in evidence, they were competent for the jury to take out with them, but were that otherwise (the court say), it is not a ground to disturb a verdict, as was intimated in *Alexander vs. Jamieson*, 5 Binney, 238, and directly decided in *McCully vs. Barr*, 17 S. & R. 445." In that case the depositions of witnesses to the will were attached to the record and were allowed to go out with the jury.

In *Spence vs. Spence*, 4 Watts, 168, Chief-Justice Gibson uses this language: "Ordinarily depositions are not sent out with the jury, because the testimony of witnesses examined at the bar cannot be sent, and to put the testimony of those examined previously on any other footing would give it an unfair advantage. But, according to *Sholly vs. Diller*, 2 R. 177, depositions taken before the register, standing not upon ordinary footing, as was said in *Ottinger vs. Ottinger*, 17 S. & R. 142, may be sent out as part of the proceedings."

In addition to the authorities cited (which, in our opinion, rule this case) we would say that as there is much in the discretion of

[*Original Edition, p. 125.]

the court as to refusal to permit papers to go out with the jury (4 Watts, 165, 1 Barr, 340, 10 Wright, 389, 7 P. F. S. 142), it is the duty of counsel to draw the attention of the court at the time to papers, records and items in statements that are objectionable to go out with the jury.

In *Kline vs. Gundrum*, 1 Jones, 253, the Supreme Court say: "Counsel have duties to perform as well as courts." If this be not done when papers go out the judgment will not be reversed. See, also, 2 Graham & Waterman on New Trials, 655 to 664; *Terry vs. Drabenstadt*, 18 P. F. S. 404; *Hall vs. Rupley*, 10 Barr, 231; *Maynard vs. Fellows*, 42 N. H. 255. And when a deposition was taken out with the knowledge of the complainant, a new trial was not granted: *Shields vs. Greffy*, 9 Iowa, 322; *State vs. Delong*, 12 Iowa, 453. But what is conclusive of this matter is that the defendant complains of error in allowing the jury to take out depositions which he himself offered and failed to get in evidence. This certainly was not error of which he can complain (*Unangst vs. Kraemer*, 8 W. & S. 391), and the mere statement of the objection is its own refutation.

Rule discharged.

*Supreme Court of Pennsylvania.

BURK'S APPEAL.

A purchaser, if he so chooses, is entitled to have the contract specifically performed so far as the vendor can perform it, and to have an abatement out of the purchase-money for any deficiency in the title. But specific performance will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance so far as to bar her dower, unless the vendee is willing to pay the full purchase-money and accept the deed of the vendor without the wife joining therein. *Saller vs. Riess*, Sharswood, J., Legal Chronicle, vol. 1, p. 167, followed.

Appeal from the Court of Common Pleas of Delaware County. Opinion delivered March 23, 1874, by

MERCUR, J.—This bill was filed to enforce performance of an agreement in writing made by the appellant, to sell and convey to the appellee certain lands in fee simple, clear of all incumbrances. It appears there was an incumbrance of a small sum on the land in favor of the widow and heirs of a former owner. This was unknown to the appellee at the time the contract was executed. The incumbrance still remains.

The general rule is well settled that the purchaser, if he chooses, is entitled to have the contract specifically performed, so far as the vendor can perform it, and to have an abatement out of the purchase-money, or compensation, for any deficiency in the title, quantity, quality, description, or other matters touching the estate. *Story's Equity*, § 779. This incumbrance comes within the general rule. So far, then, as the court below directed the amount of that incumbrance to be deducted from the contract price we discover no error.

The important question in the case arises under other facts. It appears that the appellant, at the time of the execution of the contract, had a wife, which fact was then known to the appellee; that

[*Original Edition, p. 126.]

she is still living and declines to join in the execution of a deed for a conveyance of the land. The master reported, and the court below decreed, that the appellant execute a deed in fee simple of the land, but that one-third of the purchase-money be withheld until the death of the wife, or until her right of dower should be released.

Thus the question is presented whether in case of the refusal of a wife to join in a deed with her husband conveying his land, in pursuance of his contract, the purchaser may have specific performance so far as the husband is concerned, and be indemnified against the contingent claim of dower of his wife, by retaining a portion of the purchase-money.

When the contract was executed by the appellant it was suggested to him that his wife should also sign it. He replied, in substance, that it was unnecessary, as she was a woman who never meddled with his business. That she allowed him to do as he pleased in such matters, and would do whatever he should say. Afterwards, upon the same day, the appellant informed his wife what he had done. She thereupon declared she would not sign the deed, and has continued to persist in that refusal.

The master has found that no evidence was given to satisfy him that the wife withheld her consent through collusion with her husband.

*The wife, then, has not said or done anything which compels her to unite in the fulfilment of her husband's contract. She has not executed and duly acknowledged any written instrument by which she is bound, as the wife had done in *Dankel vs. Hunter and Wife*, 11 P. F. Smith, 382. Nothing less than that would bind her: *Glidden vs. Stenpler*, 2 P. F. Smith, 400. The letter and policy of the law forbid a wife to convey her interest in land otherwise than by the exercise of her own free and untrammelled will. A purchaser by contract from her husband must be presumed to know this essential requisite, and therefore that he takes the risk of the wife uniting in the deed, or of his common law right of action for damages against the husband. It may be answered that the appellee does not ask for a decree that the wife join in the deed, but only that one-third of the purchase-money be retained to indemnify the vendee against her contingent claim, and that therefore her free will is not constrained.

The specific performance of a contract in equity is of grace, not of right. It rests in the sound discretion of the chancellor. In an action of ejectment by a vendee against a vendor to compel the specific performance of a contract for the sale of land, the plaintiff cannot recover, if the defendant be a married man, and his wife refuses to sign the deed: *Clark vs. Seiver*, 7 Watts, 107; *Hanna vs. Phillips*, 1 Grant, 254; *Weller vs. Weyard*, 2 Grant, 103.

It was said by Gibson, C. J., in *Clark vs. Seiver*, *supra*: "It seems to be at last settled on principles of policy and humanity, that equity stirs not to enforce a contract which involves in it a wife's volition in regard to her property; and it seems strange to us now, that courts of chancery should ever have hesitated about it. Con-

[*Original Edition, p. 127.]

trary to the benign spirit of the common law, the avowed purpose of process of contempt against the husband is to extort a conveyance from her affection or from her fear."

It must now be considered the settled law of this commonwealth, that specific performance of an agreement to sell land will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance so as to bar her dower, unless the vendee is willing to pay the full purchase-money, and accept the deed of the vendor without his wife joining therein: *Saller vs. Reisz*, not yet reported. In giving the opinion of the court in that case, it was well said by Mr. Justice Sharswood, "the same sound policy which forbids a decree for the execution of a deed by the husband, to be enforced by his imprisonment if he cannot obey, prevents any decree looking to compensation, abatement, or indemnity."

The decree of the court below must, therefore, be reversed.

Inasmuch, however, as upon the argument the counsel for the appellee expressed a desire to accept a deed from the appellant alone, rather than have no decree in his favor, we will send the case back in order that such a decree may be made.

Decree reversed, and record remitted, that a decree may be entered conformably to this opinion, and the appellee is directed to pay the costs of this appeal.

***Court of Common Pleas, Luzerne County.**

TRIMBLE vs. MALONEY.

1. A rule to arbitrate, on which arbitrators have been chosen, cannot be stricken off until the day of meeting has gone by. It is error to strike off on the day of meeting.
2. The practice and authorities relative to arbitration rules examined.

Rule to strike off award of arbitrators. Opinion delivered by

DANA, J.—On the 23d of May, 1868, the plaintiff entered a rule to choose arbitrators on the 13th of June. On the latter day, the defendant being in default, after proof of service, arbitrators were appointed, and the 29th of June fixed as the time of meeting.

Upon the time, and at the place named, the plaintiff's attorney and two of the arbitrators met, and no proof of service of the rule on the opposite party or arbitrators having been made, the place of the missing arbitrator was filled, and at the request of the plaintiff's attorney the arbitrators were sworn, and adjourned to the clerk's office. On reassembling the same afternoon at the latter place, the second rule was for the first time produced, and it was ascertained that it had not been served in due time upon the defendant.

The defendant thereupon declined to appear and waive the defect of service, and the plaintiff's attorney upon the same day, being the day of the meeting, by precept directed the striking off the former, and entered another rule of reference, under which arbitrators were in due time appointed, who, on the 31st of July, 1868, the time named in the rule, made an award in favor of the plaintiff.

[*Original Edition, p. 128.]

The defendant not having appeared either at the time of choosing the arbitrators or on the hearing before them, now comes into court and asks to have the award set aside.

The rule of court (rule 2d, § 1 C. R., p. 5), is, that when arbitrators have been appointed, and the day of meeting has been gone by, without any meeting or agreement to adjourn, such rule may be stricken off by the prothonotary at the instance of either party.

We are of the opinion that the entry of the rule on the 29th of June, the day of the meeting under the previous rule, and before the day of meeting had gone by, was not authorized, and that the proceedings under it, including the award, must be set aside.

Whether, under the irregularities in this case of filling the place of the absent arbitrator and swearing them, without proof of the notices required by the act, the jurisdiction of the arbitrators had attached and the power of the court taken away, it is not necessary to decide. The law may be found in the cases of *Hoffman vs. Luke*, 7 H. 57; *Camp vs. Owego Bank*, 10 Watts, 130; *Wethers vs. Haines*, 2 Barr, 435; *Foltz vs. Grubb et al.*, 4 P. L. J. 509; *Thompson vs. White*, 4 S. & R. 136; *Burnet vs. Hope*, 5 Binney, 518, and does not in our view, warrant the course adopted by the plaintiff.

In view of the course pursued by the defendant on the day of meeting and in subsequently taking a rule for the former arbitrators to file an award, the costs of the proceedings are ordered to abide the event of the suit.

*Court of Common Pleas, Schuylkill County.

ERNST *et al.* vs. ZERBE.

1. A *feme covert* may become a party to a parol partition of lands, held by her with others as tenants in common.
2. Such a partition, executed by marking the lines of division upon the ground, followed by a corresponding possession in pursuance of the agreement, is good, notwithstanding the statute of frauds.
3. Partition neither enlarges nor diminishes the estate of each tenant in common. It is less than a grant. The act of February 24, 1770, which establishes the only way by which husband and wife may convey the estate of the wife, does not apply to partition.

In equity. Opinion delivered April 6, 1874, by

PERSHING, P. J.—The heirs of John Clauser, ten in number, were tenants in common of a tract of land situated in Branch township, Schuylkill county. Martin Zerbe, the defendant, is the husband of Catharine Zerbe, one of the plaintiffs, and also one of the heirs of said John Clauser. The bill in this case prays for a decree to compel Martin Zerbe to specifically perform and carry out the terms of an amicable partition of the said tract of land, and to execute proper conveyances to the several parties.

It appears from the evidence, that in 1867 a parol agreement was entered into by which the land was to be divided, the purparts to be equal in size, except the one which would include a house erected on the land. A piece of ground, containing about fifteen or twenty acres, known as the Dundas interference, the title to which was in litigation, was excluded from the division. The heirs held several

[*Original Edition, p. 129.]

meetings before the survey was made, at none of which were they all in attendance, but the uncontradicted evidence is, that Catharine Zerbe, the wife of the defendant, was present at these meetings, and consented to the making of the partition, and that the consent of all the heirs was had. The evidence, however, fails to show that the defendant was present at any meeting held in reference to the division of the land.

Allen Fisher, Esq., who was employed as the surveyor, divided the land into purparts of eleven acres and one hundred and twenty-five perches each, except the purpart on which the house stood (No. 2), which contains but six acres and six perches, and the part allotted to Abraham Ernst, which included one or two purparts acquired by purchase from some of the other heirs. The bill alleges, what seems to be established, that the heirs took possession of their respective purparts in pursuance of said parol partition, and now hold possession of the same; that Catharine Zerbe, wife of the defendant, took possession of division or purpart No. 3, under said amicable partition, and still holds possession of the same under the terms of the agreement. The fourth paragraph of the bill sets forth "That *all the other heirs, including Catharine Zerbe, the wife of said defendant, have executed proper conveyances to each other for their respective portions, and are ready and willing to deliver the same, in accordance with the terms of the division made as aforesaid, as soon as signed and executed, by the said Martin Zerbe, the defendant, who refuses to execute said conveyance, although in possession of his wife's portion under said agreement and in receipt of the rents and profits thereof."

The answer of the defendant denies that he ever agreed to any partition of the land referred to, and alleges that the partition to which his wife consented was not made according to the agreement; that he nor his wife, "so far as he (defendant) knows," were ever satisfied with the partition attempted to be made, and that neither he nor his wife, "so far as he (defendant) knows," ever took possession of division No. 3, under or in pursuance of said amicable partition, but that his wife was in possession of the same house and small piece of land long prior to any attempt at amicable partition of said lands.

It is part of the evidence that Mrs. Zerbe was in the occupancy, prior to the making of the partition, of about one acre of ground, and a small house built upon it, and that these were included in purpart No. 3, allotted to her as her share of the land which was divided.

The evidence reported by the examiner shows that the defendant went to the office of Justice Hime, for the purpose of signing the deeds, on the 24th of June, 1871, on which day the deeds were signed by Mrs. Zerbe and other of the heirs, all of whom were satisfied; that Martin Zerbe "began to wrangle about the disputed (Dundas) land," that he said he was willing to sign all the deeds but that of Ernst, which he refused to sign "on account of his friend Philip Clauser;" that he afterwards went to Esquire Hime's office along with Mr. Ernst, to sign the deeds, when it was discovered

[*Original Edition, p. 130.]

that the deed to Mrs. Ernst included the Dundas interference; that he at that time did not sign any of the deeds because, as he alleged, his lawyer had thus advised him; that afterwards he told the justice that the true reason why he refused to sign the deeds was that Ernst had secured a piece of ground and built a tavern on it, which he, the defendant, had intended purchasing for the same purpose. To another witness the defendant stated his willingness to sign all but the deed to Ernst, who had overcharged him for some hauling. Whether his reasons were good or bad, the fact remains that the defendant did not execute the deeds. It was further shown that Martin Zerbe fenced in the eleven acres and one hundred and twenty-five perches, being purpart No. 3, and that he and his wife, since the division and allotments were made, have cut timber from said land and sold it. There was also in evidence before the examiner a written contract purporting to be signed by Martin Zerbe and Catharine Zerbe, his wife, stipulating for the sale of the coal right in said purpart. In reference to this paper it is to be observed, that Martin Zerbe testifies he never signed *his name to it, and denies that he ever admitted that the signature was his. That defendant did not sign this paper is shown by the testimony of Abraham Ernst, who admits that he appended Mr. Zerbe's name to it at the request of Mrs. Zerbe at a time when Martin Zerbe was not present.

Taking the evidence in its entirety, is it sufficient to authorize a decree of specific performance against the defendant?

To take the case out of the statute of frauds, the parol contract must not only be established by competent proof, but it should be clear, definite, and unequivocal (Br. Eq. 191), and it requires much less strength of case on the part of the defendant to resist a bill to enforce a contract, than it does on the part of the plaintiff to maintain a bill to enforce specific performance. Br. Eq. 200. Taking these well established principles as our guide, we think the clear, precise and satisfactory proof, which alone will warrant the decree of specific performance prayed for, is wanting in this case. The defendant did not attend any of the meetings where the partition was agreed upon and its conditions fixed. His living on the premises assigned to his wife, fencing the land, and, with her, selling timber cut from it, can be explained without making it that exclusive possession necessary to take a parol contract out of the statute. A husband will not be compelled to separate from his wife and family in order to show his dissent from a parol partition of lands made between his wife and the other heirs in interest. If no other difficulty lay in the way of making a decree, it is not clear to us that the defendant should be compelled to sign the deeds which have been prepared and signed by the heirs of John Clauser. They are conveyances in the usual form, for a valuable consideration, containing all the usual covenants, including that of general warranty, and make no reference whatever to the partition they are designed to carry into effect.

Nor do we think it necessary to the validity of the partition that the defendant, as the husband of one of the heirs, should sign the

[*Original Edition, p. 181.]

deeds. We are satisfied from the undisputed evidence in this case, that a parol partition was made with the knowledge and consent of all the heirs; that the lines of division of the several purparts were marked upon the ground, and that this was followed by a corresponding separate possession. Such a partition between tenants in common is good, notwithstanding the act for the prevention of frauds and perjuries. *Ebert vs. Wood*, 1 Binn. 216. No one of the heirs has made any objection to the division made. The allegation of the defendant that his wife was not satisfied, is refuted by the absence of any testimony from herself to that effect, as well as by her willingly signing the deeds in evidence before the examiner; by her own and her husband's possession of, and the fencing in of her purpart, and by their making profit off the land by the sale of the timber. The force of this is not broken by the fact that Mrs. Zerbe had a foothold before the partition (in what way does not appear) of one acre of the whole tract. *It was not till after the partition that she entered in possession of the eleven acres, one hundred and twenty-five perches, constituting division No. 3, and it is not denied that this entry was by virtue of, and in conformity with, the partition. *McMahan vs. McMahan*, 1 Harris, 376, in some of its facts resembles this case. Judge Bell, in that case, said, "It is long since settled that parol partition, if fair and equal, executed by a corresponding possession, is good, though some of the tenants be under coverture, and others of them elect to hold their purparts as before, by community of possession."

In *Darlington's Appeal*, 1 H. 430, it was decided that it made no difference that one of the parties, a married woman, never formally conveyed her interest in the part of the estate allotted to the other heir. The agreement to make partition was actually executed by lines of division marked upon the ground, followed by corresponding possession, which was sufficient to perfect it even as between joint tenants and tenants in common. It is there held that the tenure, under our system of descents, partakes of the nature of coparcenary and that a parol partition between heirs in Pennsylvania is good.

Partition between coparceners (and tenants in common) neither amounts to nor requires an actual conveyance. It is less than a grant. It only adjusts the different rights of the parties to the possession. At common law a partition between parceners by parol was legal and efficacious, though they might make a valid partition by deed or by release: *Allnatt on Partition*, *124-5. The partition does not convey or make any alterations in the estate: *Id.* 144. It neither enlarges nor diminishes the estate of each tenant in common, but ascertains the particular part of each and gives it to him in severalty. The tenure, however, is no more changed by the partition than by the adjustment of a boundary. The parties hold after it by exactly the same title as that by which they held before it. A married woman may therefore be a party to an amicable partition, for she makes no grant. The act of February 24, 1770, which provides the only way in which husband and wife can legally convey

the lands of the wife, has no application to a partition: *Rhoads' Estate*, 3 Rawle, 420.

The act of 1770 is not repealed by the act of 1848 in this respect: *Peck vs. Ward*, 6 H. 506.

A *feme covert* being compellable to make partition may become a party to an amicable action of partition, and so also may minors by their guardians: *Wetherell vs. Meck*, Bright. R. 135.

Family arrangements are regarded with favor, and a parol partition among heirs, if fairly made, is binding even upon *femes covert*, if they are parties to it and assent to the arrangement. But it is binding only when the partition has been agreed to by all the joint owners and when it has been executed. It need not be of all the lands which the parties hold in common or jointly, but it must be complete so far as it relates to *the part set out in severalty: *McConnell et ux. vs. Carey et ux.*, 12 Wr. 345. See also *Calhoun vs. Hayes*, 8 W. & Ser. 127.

These authorities settle that a parol partition of land, even where some of the parties are *femes covert*, is good, if equal and executed by the taking of possession of the several purparts; that such partition is not a conveyance of the wife's interest in her real estate, in which her husband must join to give it legal effect.

While we do not think the evidence will warrant a decree of specific performance, we do think there is sufficient disclosed against the defendant to make it proper that the order for the dismissal of plaintiff's bill shall be without prejudice. The plaintiff's bill is dismissed without prejudice, with costs to defendant.

Supreme Court of Pennsylvania.

DEHAVEN'S APPEAL.

1. Under sec. 41, act of March 15, 1832, an issue *devisavit vel non* is of right whenever a dispute upon a matter of fact arises before the register's court.
2. But the fact must be material to the subject of controversy, a substantial matter of dispute, necessary to be determined before a decision can be reached.

Appeal from the decree of the Register's Court of Philadelphia. Opinion delivered March 9, 1874, by

AGNEW, C. J.—This case is an unsuccessful attempt to convert physical weakness and mental distress into imbecility of mind and to extract undue influence over the judgment and will of a parent from filial affection and devotion to the parent's welfare and happiness. Mrs. Sophia DeHaven's husband was an invalid for years, and for months before his death a bedridden sufferer. Some of her sons were irregular in life and disposed to draw heavily upon her purse. She, the wife and mother, whose will is in controversy, was a woman of great sensibility, quick in feeling and ardent in affection. In prosperity she was lively and pleasant and happy while the current of life ran smoothly, but in affliction she became nervous, excitable, despondent and full of tears. Owing to the long continued sickness, suffering and death of her husband, the misery arising from her sons, and the death of John, she frequently

[* *Original Edition*, p. 133.]

gave way to grief, and became unable to control her feelings, and was seized with hysteria of the most marked and distressing character. During this gloomy period of her life it caused her to cry and laugh in the same instant and to the unthinking to appear to be beside herself. Under such circumstances it was not difficult to find persons ready to believe Mrs. DeHaven's mind had become unsettled and to form opinions of her unsoundness founded on these exhibitions of distress and hysteria. These opinions form the principal staple of the case of the appellants, while facts of a distinct and convincing kind are entirely wanting. On the other hand, the proof of Mrs. DeHaven's competency not only to make a proper *distribution of her property by will, but to direct and conduct her affairs, so far as not prevented by bodily infirmity, is overwhelming. Not only was she able to furnish instructions for her will, but she actually visited the office of her adviser and scrivener alone and executed the codicil there under circumstances to evince both ability and purpose of mind. Her testamentary acts were not done upon a sick or dying bed, were not the products of a wandering and sinking intellect, but were executed with full purpose and resolution in 1859 and 1861, years before her death, and before that paralysis in 1865, which finally broke down her intellect and in two years brought her to the grave. From 1859 until 1865 facts of the strongest character evince her knowledge of business and disposing power—acts of deliberation and thoughtfulness in contracting liabilities, conveying property, and receiving and paying out money, calculated to arrest attention and demand the scrutiny of those with whom she dealt, had there been anything of the disability imputed to her by those who now contest her will. The contestants themselves were parties to some of these transactions, joining in and receiving deeds, making notes, paying money, and acting as men having not the slightest doubt of her capacity. In one transaction for the accommodation of Kevy & DeHaven she gave more than eighty notes, until in 1865 her decaying powers made it necessary to desist calling upon her. So she received the rents from her tenants monthly and gave receipts without number. Altogether the facts proving her soundness of mind are so overwhelming and the opinions to the contrary so unfounded, no court would suffer a verdict against the will to stand for a moment.

The evidence of undue influence by Mrs. Hampton over Mrs. DeHaven's mind is equally weak. There is not a fact in evidence having any weight. The evidence is conclusive that the provision she made for her daughter, Mrs. Hampton, was long contemplated and believed to be due to her, because of the inequality between the provision for her and that for the sons in the will of her husband. When, added to this, Mrs. Hampton took upon herself the management of her household affairs and attention to her business, while in her season of distress and suffering, and by her love and regard and those attentions which a daughter devoted to her mother only can render, brought back to her comparative happiness and comfort, we cannot wonder that Mrs. DeHaven felt it a duty to provide liberally for such a daughter. Yet in doing this she did not forget

[*Original Edition, p. 134.]

her sons. Though grieved by what she deemed their errors, she remembered them in her will in a manner to indicate it was not a nominal recollection that thinks to deprive, but a thoughtful remembrance which gives liberally according to desert. Upon the whole, we find no ground upon which a verdict against the will, had an issue been granted, would be permitted to stand.

This brings us to consider the question upon refusing the issue by the *Register's Court. Under the 41st section of the act of March 15, 1832, an issue is of right whenever a dispute upon a matter of fact arises before the Register's Court. But the fact must be material to the subject of controversy, a substantial matter of dispute necessary to be determined before a decision can be reached. It cannot be denied that the petition for an issue in this case set forth material facts to be decided before Mrs. DeHaven's will could be admitted to probate, to wit: want of legal capacity to make a will and undue influence on part of Mrs. Hampton, and an issue was demandable of right to try these facts. But after the refusal of this issue, the parties having gone into the entire evidence and each having been fully heard, the case being before us on appeal, we must look at it, as we always do, to see whether any substantial injustice has been done before we send it back for a rehearing. Certainly we ought not to reverse if the court below would have been bound to set aside the verdict as contrary to the manifest weight of the evidence. Of what use would it be if the case can be decided in but one way? As remarked by Chief-Justice Black, in *Knight's Appeal*, 7 Harris, 493, a mere naked allegation, without evidence or against the evidence, cannot create a dispute within the meaning of the law. This was said in a distribution case under a sheriff's sale where the issue is of right. More to the point is *Dean vs. Fuller*, 4 Wright, 474, where an attempt was made to set aside a deed on the ground that the grantee had procured it when the grantor was weighed down by grief at the loss of his wife and by reason of weakness of mind and body, caused by constant watching and anxiety during her sickness, as well as by his advanced age (over eighty years), the grantor was enabled to overreach him. There Justice Thompson said that, after carefully considering the evidence, we think it is entirely insufficient on any ground claimed for it and asks the pertinent question—Why refer insufficient evidence to the jury? It is now especially true since we hold that a mere spark of evidence is not sufficient to carry a case to the jury. The doctrine as to issues from the Register's Court is well settled in *Graham's Appeal*, 11 P. F. Smith, 43, to which may be added *Coxsens' Will*, Id. 196.

Upon the whole case we find nothing to contest, and the decree of the Register's Court is affirmed with costs, and the appeal dismissed, and the record ordered to be remitted to the Register's Court for further proceeding, if any be necessary.

[* *Original Edition*, p. 185.]

DIMMICK vs. BROADHEAD.

An action of trespass may be maintained, if a corporation takes land for public use before entering a bond for compensation.

Error to the Court of Common Pleas of Pike County. Opinion delivered March 23, 1874, by

AGNEW, C. J.—It has been settled in a series of cases from *Orange vs. Harrisburg Water Co.*, 3 W. & S. 490, to *Pittsburg, Fort Wayne and Chicago R. R. Co.*, 16 P. F. Smith, 404, that it is trespass in a private *corporation to take land for a public use without first making compensation, or giving adequate security therefor. The constitutional provision is express that this must be done "before such property shall be taken." This amendment of 1838 meant something. The 10th section of the bill of rights in the constitution of 1790, merely provided that property should not be taken or applied to public use "without just compensation being made." Under this clause it had been held that it was not necessary that the compensation should be actually ascertained and paid before appropriation, it being sufficient if an adequate remedy was provided as the means of obtaining it without unreasonable delay. But the remedy is illusory in the case of a private corporation, where it is without means, or becomes insolvent, and, hence, the provision in the 4th section of the 7th article of the constitution, as amended in 1838, viz.: "The legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owners of said property or give adequate security therefor, before such property shall be taken." The language is not shall tender, but shall give adequate security. The word "tender," in the proviso of the 10th section of the general railroad law of 1849, is a departure from the words of the constitution. If the adequacy of the security be left in the first instance to the determination of the corporation, the effect of a tender merely might be ruinous to the property-owner. An entry and destruction of valuable property by a corporation, would be without compensation at the end of a contest about the adequacy of the security, if then the security should be found to be insufficient, and the corporation insolvent. The legislature, therefore, remedied this defect in the act of 1849, by the second section of the act of 9th April, 1856, 2 Brightly, 1220, p. 36, providing in case of the refusal of the owner to accept the tender, that notice of presenting the bond for filing in court should be given, and making the bond subject to the approval of the Common Pleas. Less than this is no sufficient provision for compensation under the amendment of 1848, and would leave the people unprotected in their possessions. The people, in their amendment, have expressed their determination to secure themselves fully against the wrong and grasping avarice of those who exercise the power of eminent domain, often more for their own interests than those of the public. It was different where the State herself exercised her own power.

[*Original Edition, p. 136.]

She could proceed at once, upon making a sufficient provision for compensation. Her ability to compensate in the end is undoubted. The entry, in this case, before the approval of the bond, was a trespass, and as such, the common law remedy is applicable; *Crangle vs. Harrisburg Water Co.*, 3 W. & S. 490; *McClinton vs. R. R. Co.*, 16 P. F. Smith, 404.

Judgment affirmed.

*Orphans' Court, Montgomery County.

In re ESTATE OF ELIZABETH KLINE, Deceased.

A clause in testatrix's will empowered the executrix to sell the real estate, "if in her opinion she should think it best," and directed the balance of the purchase-money, after the payment of a certain debt, to be put out at interest, well secured. It further provided for a certain distribution of the balance of the estate at the death of the two daughters, E. and A., and appointed the daughter E. executrix.

E. died without having sold the real estate, and A. became administratrix *c. t. a.*, and petitioned the court for an order to sell the real estate, which petition set forth no other ground than that the petitioner thought "it best and most advisable to make sale of the real estate without further delay." The order was granted, the report of sale confirmed *nisi*, and exceptions filed. After argument, the sale was set aside, and it was held that the fund arising from such sale would not be in condition to be administered and distributed, but a testamentary trust would be constituted, which cannot be committed to an administrator *c. t. a.*

Opinion delivered by

Ross, J.—The learned president of this court awarded this order of sale on the 22d of February, 1869, and report of its execution was duly presented and confirmed *nisi*; at that time, the purchaser appeared by counsel, and suggested that there was a question, under the trusts declared in the will, as to the power of the court to direct a sale.

It was then determined by agreement of counsel, at the instance of the court, to file exceptions to the confirmation of the sale, and under those exceptions this question of the authority of the court to decree a sale, it was further agreed, should be determined. The only inquiry, therefore, which is presented by the exception, is whether the administratrix *de bonis non, c. t. a.*, under the special provisions of the will of the testatrix could exercise the power of sale conferred by the will upon the deceased executrix, and dependent upon the adjudication of this point, whether the court had the power to award an order of sale upon the petition of the administratrix.

It is well settled, that whenever a power of sale is vested in an executor, *virtute officii*, the administrator, *c. t. a.*, upon his decease, may execute that power, for the purpose of bringing the land into course of administration. This power is statutory, and is derived from the 1st, 2d, and 3d sections of the act of March 12, 1800, Purdon Pl. 67, 68, and 69, and from the 12th, 18th, 14th, and 67th sections of the act of February 24, 1834, Purdon Pl. 61, 62, 63, and 65 (Title Decedents), and it has been held that the bond executed before the register, in order to obtain letters of administration *c. t. a.*, will be held as security for the faithful application of the proceeds of real estate sold in pursuance of such power, exercised for the purposes

[*Original Edition, p. 187.]

of administration: *Hartzell vs. Comth.*, 6 Wr. 453. But the power which by these statutes is vested in the *administrator c. t. a., is granted only for the purpose of bringing the land into a course of administration; *Ross vs. Barclay*, 6 Harr. 179; *Kaefer vs. Schwartz*, 11 Wr. 503; *Hartzell vs. Comth.*, *supra*.

It is, however, equally true that no statute of Pennsylvania empowers an administrator, with the will annexed, to execute a trust of land confided to an executor by name or title, for any other purpose than to sell for the object of bringing the land into a course of administration. The object of the acts referred to, was to vest the power to sell in administrators c. t. a., for purely administrative purposes, and whenever the proceeds of the land will, and must by the terms of the will, remain in the hands of the administrator, who must retain them for fiduciary purposes, then there is no dissolution by statute of such power of sale upon such administrator.

The sections cited, by judicial construction, have been held to place an administrator c. t. a. upon the same footing with a surviving executor, but they were not intended to transform him into a testamentary trustee: *Ross vs. Barclay*, 6 Harris, 179. In this case Chief-Justice Gibson says: "Now the object of the statute was to make land legal assets in all cases, not to confound the distinction between trusts and powers. With us, land has perhaps always been legal assets, and when a trust is created to bring it into a course of administration, it is proper that an administrator should succeed to the execution of it, but the statute was not intended for a trust unconnected with an executor's ordinary duties." The same distinction is recognized in the cases already cited.

To determine the questions raised in this inquiry, the will of the testatrix must be examined to ascertain whether the grant of authority to the executrix was that of a naked power, or a trust created to bring the land into administration, or whether it be a trust unconnected with the ordinary duties of executorship, and, therefore, technically, testamentary.

The clauses in the will, which invoke this inquiry, are as follows: "I give and bequeath to my daughter, Elizabeth Kline, all the yearly income or profits arising out of all my real estate during her lifetime, and at her decease, the above specified income and profit shall fall into the hands of my daughter, Abigail Shoemaker, during her lifetime. I do hereby empower my executor to make public sale of all my real estate, if in her opinion she should think it best, otherwise she is not. In case my executrix effect a sale on my real estate, I order and direct her first to pay the large debt out of the purchase-money, and the whole of the balance thereof shall be put out at interest, and well secured for the payment thereof. At the decease of my daughters Elizabeth and Abigail, the whole balance of my estate (except the clock) shall be equally divided into five parts and divided as follows, viz.: (then follows the distribution). I do hereby constitute and appoint my daughter Elizabeth Kline my executrix to carry into effect the tenor and meaning of this my last *will and testament, with full power to make a good and permanent title to the purchaser."

[*Original Edition, pp. 138 and 139.]

Elizabeth Kline, the younger, accepted the trust, and held the real estate thus devised, until her death, without exercising the power of sale thus vested in her. Upon her death, Abigail Shoemaker, the *cestui que* trust in remainder, obtained letters of administration *c. t. a.*, and presented the petition upon which the order was awarded. This petition recited the clauses of the will, declared that in the judgment of the petitioner it was "best and most advisable to make sale of the real estate without further delay," and prayed that an order of sale might be decreed. No amount of any existing indebtedness was made, the sole ground upon which the exercise of the power was invoked being the judgment of the administratrix as to the advisability of the sale. It is apparent that if this sale be confirmed, the purchase-money will be substituted for the land, and will be held for the uses and trusts indicated by the will and limited upon the sale of the real estate. That instead of being in condition to be administered and distributed, this money must be held and invested, and the interest annually accruing thereon be paid to Abigail Shoemaker, during her life. That this constitutes a testamentary trust, is too clear to admit of argument. If Elizabeth Kline, the executrix, had in her lifetime exercised the distributionary power of sale vested in her, and sold this real estate, and invested the proceeds as directed by the will, a trust would have sprung into existence the moment such sale was effected. That trust would have been to hold the principal during her own life, and annually receive the income, and at her death a further trust as to the income, to Abigail Shoemaker, during her life, and at her death a still further trust to pay over this invested principal to the legatees named in the will. If the sale had been effected by Elizabeth, could it be pretended that upon her death an administrator of Elizabeth Kline, the elder, with the will annexed, would, *virtute officii*, have become the trustee of this fund? It would have then been the duty of the Orphans' Court, upon the happening of this contingency, to have appointed a trustee of the fund.

Yet, if this sale be confirmed, this testamentary trust will at once spring into existence, and attach to the purchase-money, and will subsist until the death of Abigail Shoemaker, the *cestui que* trust and administratrix. This will clearly be an execution of a testamentary trust, and almost a creation of it, which the authorities cited demonstrate cannot be committed to an administrator *c. t. a.*, by force of the statutes. If Abigail Shoemaker were dead, and nothing remained but distribution, after formal administration, to convert the assets into money, no testamentary trust would be invoked, and the power to decree sale would be undoubted; but while she lives, the sale calls into being a trust for her benefit, and in protection of remaindermen, with which an administrator *c. t. a.* cannot intermeddle. This view being decisive of the question of power *in the administratrix and jurisdiction in the court, renders it unnecessary to discuss, whether by the terms of this will the power to sell during the lifetime of Abigail Shoemaker, did not expire with Elizabeth Kline, being committed to her individuality.

The other ground being sufficient to determine this case, that point is not decided.

An excellent test to determine whether the power of sale sought to be exercised is vested by statute in an administrator *c. t. a.*, is whether the administration bond will render the sureties therein liable in case of a misapplication of the fund. That bond is conditioned for the faithful performance of an administration with a will annexed, and not for the faithful execution of trusts limited in such will. It seems apparent in this case, viewed with the light afforded by *Hartzell vs. Comth.* that the sureties in the administration bond would not be liable for a breach in the faithful execution of the trust by the administrator, but if there be a duty not carried by the condition of the bond then it is a duty not within the purview of the powers vested in the administrator with the will annexed, and it is a testamentary trust which he cannot execute *virtute officii*.

It is with some regret that I have come to the conclusion that this sale must be set aside, for the purchaser is anxious to accept title if he can safely do so—but this is so clearly an exercise of authority not vested in the petitioner *virtute officii*, that a decree confirming this sale would be a mere nullity.

Title can be vested in the purchaser by other and much more secure means; and while it is not the duty of the court to point them out it is theirs only to see that their decrees are not in excess of the powers vested in them.

Sale set aside. The order of sale and all proceedings therein revoked.

Supreme Court of Pennsylvania.

PLYMOUTH MANUFACTURING COMPANY'S APPEAL.

A contract by which A agreed to execute a good and sufficient deed of a lot of ground to B, upon the payment of fifty dollars, the erection of a building, and its operation as a foundry by the latter, will be enforced, notwithstanding the business of a foundry was afterwards changed.

Appeal from decree of the Orphans' Court of Luzerne County. Opinion delivered March 23, 1874, by

GORDON, J.—The plaintiffs, claiming under John F. Derby, on the 27th of November, 1871, presented their petition to the Orphans' Court of Luzerne County, praying for a decree of specific performance against the administrator and heirs of George H. Dietrick, deceased. This petition is founded upon articles of agreement, dated March 1, 1860, in which *Dietrick agrees to convey to Derby a certain lot of ground in Plymouth, Luzerne county, the consideration for which is set out as follows: "whereas, John F. Derby, of Pinegrove, Schuylkill county, Pennsylvania, is about erecting a building on lands of Henderson Gaylord and Draper Smith, in Plymouth, Luzerne county, Pennsylvania, of about two hundred feet in length and about thirty feet in width, to be used as foundry and machine shop, according to the general acceptance of the term; and whereas, it is necessary to have more land to lay down a

[*Original Edition, p. 141.]

railroad track and several switches for the convenience of building and repairing railroad cars, and a connection of the said railroad and switches with the Lackawanna and Bloomsburg Railroad: Now, George H. Dietrick, of Plymouth, Luzerne county, Pennsylvania, agrees for himself, his heirs, executors and administrators, in consideration of the erection and completion of said building, and the further consideration of the sum of fifty dollars, to be paid to him, the said George H. Dietrick, that he will make and execute unto the said John F. Derby, his heirs or assigns, a good and sufficient deed for the following described piece of land, situate in Plymouth aforesaid, whenever the said building as aforesaid shall be erected, and (the) business aforesaid shall be in operation."

The court below refused its decree on the ground that the agreement on the part of Derby to erect the building and use it for a foundry and machine shop, was a continuing condition or covenant, and hence, it was broken by the subsequent conversion of such building to other purposes. If the premises thus adopted by the court be correct, the conclusion follows as an inevitable consequence, for no one can come into court with a broken covenant in his hand and successfully move that court in his favor. If, however, the case is as the plaintiff contends, that Derby, in good faith, erected the stipulated building, and used it for the purpose intended by the parties to the agreement, and the covenant was not a continuing one, then the complainants should have had the decree they asked for.

The question depends for its solution upon the construction of the contract. The main facts are undisputed. Derby, in 1860, erected the building, and he, his representatives, and vendees, including the plaintiffs, used it as a foundry and machine shop from that date until the year 1870, when it was sold to Harvey Bros. & Kern, who removed the machinery, and converted it into a planing mill.

A governing question in this case is as to the time when Derby was entitled to demand his deed. Upon this point we can have no difficulty, for thereupon the contract is specific: "Whenever the said building as aforesaid shall be erected, and the business mentioned shall be in operation," then, upon the payment of fifty dollars, Dietrick was to execute to Derby, his heirs or assigns, a good and sufficient deed for the premises. From the testimony no one can doubt that Derby did erect the building, and did put the required business into full operation. It is not even pretended *that he was derelict in a single particular. Having then complied with his covenant in good faith, was he not entitled to his deed? Had he not done all he contracted to do? But it is insisted that had a deed then been made, Dietrick might have inserted the covenant therein as a condition, by which the deed would have been forfeited upon a change or abandonment of the specific business. But to this we answer the parties did not so contract, and no such inference can be fairly drawn from the language of their agreement. Derby's covenant was to do a particular thing, not to continue the doing thereof through all time.

[*Original Edition, p. 142.]

The condition was a precedent one, and upon its fulfilment he was entitled to a good and sufficient deed. But a good and sufficient deed means one that will pass the estate of the grantor free from all conditions or encumbrances. Under such a covenant we could not consent to permit the property to be subjugated by a perpetual condition so onerous as to seriously detract from, if not wholly to destroy its value, unless the terms of the contract clearly required it.

It follows from what has been said, that if Derby in his lifetime, as the testimony clearly indicates, complied with his covenant, by erecting the building required by the articles of agreement, and using it as a foundry and machine shop, it only remains for his vendees to pay to Dietrick's representatives fifty dollars, with lawful interest, in order to entitle them to a deed.

Order of the court reversed, and *procedendo* awarded.

LEONARD vs. DARIS *et al.*

If a justice issue an execution, although there has been an appeal, *the constable cannot be held liable for proceeding with the execution.*

Error to the Common Pleas of Clearfield County.

PER CURIAM. *March 30, 1874.*

The execution being regular on its face, and the justice having jurisdiction, the constable was protected by the writ, notwithstanding the judgment before the justice was superseded by the appeal. The mistake, or even the wilful wrong of the justice in issuing the execution, reciting the superseded judgment as in full force, could not affect the constable, who could know nothing except what he saw on the face of his writ. Having an execution regular in all appearance, he cannot be placed in the embarrassing position of refusing to execute it, by a mere notice from the defendant that he has taken an appeal. The only notice the officer is bound to regard, is one proceeding from the same authority that issued the writ. It is the province of the justice to determine whether the appeal is regularly taken, and if so, to countermand the execution, if he have issued it: *O'Donnell vs. Mullen*, 3 Casey, 199. The constable having no authoritative notice of the appeal was protected by his writ. *This is according to the current of decision in this State, and is essential to the protection of officers proceeding *bona fide* in the execution of their duties.

Judgment affirmed.

BROWN vs. BENNETT.

1. A naked ratification by a married woman after discovery is of no avail, but where there is a consideration and sufficient to support the promise, it is good.
2. *Clark vs. Thompson*, 2 Jones, 274, distinguished.
3. An entry by the grantor is not required in Pennsylvania to complete the forfeiture.

Error to the Court of Common Pleas of Luzerne County. Opinion delivered *March 16, 1874*, by

[**Original Edition*, p. 143.]

SHARSWOOD, J.—That a married woman has no capacity to contract for the sale of her real estate, or to convey it, except in the precise statutory mode conferring the power, is one of the best settled doctrines of our law. See the cases cited in the opinion of the present chief-justice in *Gidden vs. Strupler*, 2 P. F. Smith, 402. It was held in that case that she could not be affected either by legal or equitable estoppel, so as to preclude her heirs from setting up and recovering upon her title. But it was not decided in that case, or any other, that she could not ratify the contract after the coverture had ceased, and she has thereby become perfectly *sui juris*.

It is contended that the contract being absolutely void was incapable of ratification without a new contract founded upon a new consideration. It may well be that a naked ratification by the married woman after discovery would not avail. A mere admission of her liability might not be sufficient. But there is something more in this case. She received one of the instalments due upon the contract after the death of her husband. The authority of the agent is not denied, and the case stated expressly admits that she received the money. This is a consideration, and sufficient to support the promise to ratify the contract, admitting a consideration to be necessary. It was, in effect, a redelivery by her of the articles, and an acknowledgment that she had duly received the instalments previously paid during the coverture. Such a redelivery of the original agreement in writing is not a new parol contract void by the statute of frauds.

The case of *Clark vs. Thompson*, 2 Jones, 274, relied on by the plaintiff in error, as almost exactly parallel with that in hand, was a very peculiar one, and decided on its circumstances. It is true that the married woman after the discovery had received some of the stipulated returns reserved in the articles. Yet the returns then ceased to be paid, and she was ejected from two acres of land reserved to the grantors.

The conditions of the contract had been clearly violated by the vendee. "The defendant," said Mr. Justice Burrside, "came in under the title of Clark and wife upon certain conditions which they refuse to fulfil. *They deny her right, yet they say they have a grant of that right in fee; but when that grant comes to be examined, the law in its wisdom replies to them, that when Fanny Clark signed the agreement she was a *feme covert*; as to her it was void, and the law cast the estate upon her on the death of her husband, when she became a *feme sole*; it did not bind her, she never acknowledged it as the statute requires. If they had suffered this lone woman to remain in her cabin, and paid her the rent the agreement required, there is no doubt she would have been satisfied." The stipulation in favor of the woman had not been performed but for two or three years after her husband's death, which was twenty years before the trial. It is clear that the case was decided on the ground of a breach of condition, and although it was insisted that there ought to have been an entry before suit, no notice was taken of that objection, and it has been since solemnly held in *Sheuffer vs.*

[*Original Edition, p. 144.]

Sheaffer, 1 Wright, 535, that an entry by the grantor is not required by the laws of Pennsylvania to complete the forfeiture.
Judgment affirmed.

JOHNSON *vs.* WILLIAMS *et al.*

Landlord's lien for one year's rent on goods liable to distress is a prior lien by the act of 1836.

Appeal of A. H. Barnes. Error to Common Pleas of Warren County. Opinion delivered April 2, 1874, by

AGNEW, C. J.—The effect of the 83d, 84th and 85th sections of the act of 16th of June, 1836, is to create a charge in favor of the landlord for rent, not exceeding one year, upon the goods liable to the distress of the landlord for this rent, in and upon the demised premises at the time of taking such goods in execution. After the sale the officer is required to pay the rent first out of the proceeds and apply the surplus only to the execution, and in case of the insufficiency of the proceeds to pay the rent and all the costs, the same costs only shall be allowed as would have to be paid in case of a sale under distress. Moreover, after a levy on goods liable to distress, the plaintiff in the execution cannot stay proceedings without the consent of the landlord first had in writing. Thus, call the charge a lien, or by any other name, it is clear the rent of the landlord is a prior charge by law, and the sale under execution is for the benefit of the landlord. Whenever, therefore, the writ of execution will carry a valid sale over the head of the assignee in bankruptcy, it is evident it carries with it the landlord's claim for his rent. The State law makes the rent a valid charge prior to the right of the execution creditor, so that his precedence over the assignee in bankruptcy necessarily lifts up the precedent rent above him also.

Decree affirmed with costs and appeal dismissed.

*Court of Common Pleas, Delaware County.

ROOT & RUST *vs.* THE OIL CREEK AND ALLEGHENY RIVER RAILROAD COMPANY.

A railroad company formed by the consolidation and merger of two or more railroad companies, is responsible for the debts and liabilities of each of the merging roads arising prior to such consolidation.

A provision in the charter of a railroad which makes it subject to the provisions and restrictions of the act of February 19, 1849, limits its right to charge for toll and motive power, when the cars used for transportation over the road are owned or furnished by others, to two cents for each car, and three cents for each ton per mile carried, but does not limit it to FREIGHT charge, if it furnish the car.

If a consignee who furnishes such a car, pays to a connecting road the back charges of the company thus restricted, in order to get possession of his goods, which charges so paid are largely in excess of the toll authorized, such a payment is a payment to the company restricted, and enures to the benefit of the consignee, the same as though it was paid directly to the original company.

A voluntary payment, although it be unauthorized, cannot be received back, but where a consignee, in order to secure his goods, of which he has need, and which, if not taken by him are exposed to risk of fire and damages, pays the charges of the party having the goods in possession, such a payment is not voluntary, and if illegal can be recovered back.

The difference between tolls and freight explained.

[* *Original Edition*, p. 145.]

Charge of

BUTLER, P. J.—Gentlemen of the Jury:—This suit, as you have learned, is brought by Root & Rust, plaintiffs, against the Oil Creek & Allegheny River Railroad Company, defendants, to recover a sum of money amounting to upwards of one hundred thousand dollars. This money, the plaintiffs say, is due on account of overcharges made against them by the Oil Creek Railroad Company, for the transportation of oil over its road, between April 6, 1866, and the 27th of February, 1868.

The defendant is not, as you have observed, the Oil Creek Railroad Company, but having acquired the rights and property of this company, under an act of assembly relating to the subject, the defendant has become responsible for all its obligations, and the suit is to be treated, therefore, precisely as if it had been brought against the Oil Creek Railroad Company while it existed.

Are the plaintiffs entitled to recover the money claimed, or any part of it?

The case presents four questions of fact for your determination:

First. Did the plaintiffs ship oil over the Oil Creek Railroad? If they did, then,

Second. Were they overcharged? If they were, then,

Third. Did the plaintiffs pay those charges to the Oil Creek Railroad Company? If they did, then,

Fourth. Were they required to pay, or did they do it voluntarily?

The first of these questions—Did the plaintiffs ship oil over this road?—needs but little explanation.

*If they purchased and paid for the oil which was consigned to them, as they say they did, before it started upon its journey, then they were its shippers.

And this question is to be answered by reference to the evidence bearing upon it.

The second question (supposing the plaintiffs did ship oil over the road)—Were they overcharged?—is to be solved, by determining whether the plaintiffs were liable to pay freight, as for carrying their oil in tanks or to pay tolls, as for hauling their cars over the road.

If they were liable to pay freight, then they were not overcharged. We so instruct you, as matter of law.

The railroad company had a right to charge whatever it saw fit for freight, and those who chose to send freightage over its road could not complain. They could send, or not send, at their pleasure; but if they did send they must submit to the charges.

If, on the other hand, the plaintiffs were liable only for tolls as for hauling their cars, or cars furnished by them, loaded with oil, then it is equally clear the plaintiffs were overcharged.

For as respects tolls, the railroad company is limited by law to two cents for each burden car (4 wheels being a car), and three cents per mile for each ton of 2,000 pounds carried therein.

The charges here greatly exceed this, being made according to the

rates of the company for freight, under claim that the plaintiffs were properly liable to be so charged.

And thus we are brought to the great question in this cause, the question upon which the parties have put out their strength, and upon which, doubtless, it is mainly to be decided, to wit:

Did the plaintiffs furnish the cars, which carried the oil, to the railroad company to be hauled over the road as their cars? If they did, they were liable only for tolls, and consequently they have been overcharged. Or did they furnish simply the oil and the vessels (tanks) in which it was contained? If so, they were liable for freights, and consequently have not been overcharged.

If you find the plaintiffs were overcharged, then you pass to the third question: Did the plaintiffs pay these charges to the Oil Creek Railroad Company?

If those who paid the company at Corry should be treated as having paid on behalf of the plaintiffs, or if in consequence of the course or custom of business between the several railroad companies carrying the oil, the Erie Company, by whom the money was collected at Jersey City, should be treated as receiving it for the Oil Creek Company, then the result is the same as if the payment had been made directly by the plaintiffs to the Oil Creek Company.

It is sufficient, if the money was paid by the plaintiffs to the Oil Creek Railroad Company either directly or indirectly, as through agents.

*If you find the plaintiffs were overcharged, and that they paid these charges to the Oil Creek Railroad Company, then you will come to the fourth question stated: were they required, virtually forced, to pay these charges or did they do it voluntarily?

Money which a man pays voluntarily to another cannot be recovered back. It makes no difference that he did not owe it; he should not have paid. But if he is virtually forced to pay, as by reason of the circumstances in which he is placed by those making the demand, then the payment is not voluntary, and he may recover back what has thus been improperly obtained.

If, therefore, the plaintiffs' situation was such that they were compelled to pay or run the risk of impending loss, as from non-delivery and waste of their oil, and were thus induced to pay more than was due, then the payment was not voluntary.

Such are the questions upon which the cause depends. And as tending to a further explanation of them, and for the purpose of getting their respective views before you in this connection, the parties have requested us to say certain things to you which they have presented in the form of points.

The plaintiffs ask us to say:

"First. That the defendants are by their charter made liable to all the restrictions contained in the act of February 19, 1849, and that under that act they had the right to charge for toll and motive power on cars owned or furnished by others than the defendants not more than the rates prescribed by that law, to wit, three cents per mile for each ton of 2,000 pounds of freight carried, and two

cents per mile for each burden or freight car, every four wheels being computed a car."

This is true. We affirm it.

"Second. If the jury find from the evidence that the oil claimed by the plaintiffs was their oil, and that they paid the freight on the same, and that the tank cars in which the oil was transported were not owned or furnished to the plaintiffs by the defendants, but that the trucks were owned by the Erie Railway Company or Atlantic and Great Western Company, and the tanks by the Oil Tank Company, and when mounted with tanks the tanks became oil tank cars, the use of which the Oil Tank Company had the right to control, and in the exercise of that control rented to the plaintiffs for the transportation of their oil, who furnished them to the defendant for said transportation, then the defendant could only charge for toll and motive power and were limited by the restrictions of the act of 1849."

This, also, is true, and is affirmed.

"Third. If the jury believe that the tank cars used in the transportation of the plaintiffs' oil, from April, 1866, to July, 1867, were not owned or furnished by the defendant, but were furnished by the plaintiffs, who rented them from the Oil Tank Company, then the defendant could only charge for toll and motive power, the limits fixed by the act of 1849."

This, also, is correct.

And the plaintiffs further request us to say in this connection that:

"In considering this question, as to who furnished the cars, the jury may take into consideration the testimony going to show that the plaintiffs rented those cars from the Oil Tank Company, paying about one hundred dollars per car per trip for the use of the tank car; that the Oil Tank Company controlled the use of the car, all applications for their use having to be made to them; that the railroad company who owned the trucks of the tank cars charged the Oil Tank Company for transporting these cars empty from Jersey City to Corry; that the defendant charged the Oil Tank Company for taking the empty cars from Corry to the place of loading, and that all leakage was paid by the Oil Tank Company to the shippers on account of these oil tank cars."

And we do say so. You may and should, in passing upon this question, consider the matters here referred to by the plaintiffs to the extent you find them proved. But you must, in this connection, also remember and consider the testimony produced by the defendant, bearing on this same question and tending to support its allegations.

"Fourth. If the jury believe that the tank cars used in the transportation of the plaintiffs' oil from July, 1867, to February, 1868, were owned or furnished by the plaintiffs, who secured them from the Erie Tank Line, then for toll and motive power charges, the defendant could charge only under the limits fixed by the act of 1849."

This is true, and is but a repetition of what we have before said.

[*Original Edition, p. 148.]

"Fifth. If the jury find from the evidence that the Erie Railroad Company and the Atlantic and Great Western Railroad Company had parted with the cars to the Oil Tank Company, who furnished them to the plaintiffs, and that the defendant had notice of the fact that the railroad owning the cars had so acted, then the defendant cannot avoid the limitation of the law of 1849 by the payment of any sum for mileage to the Erie Railroad or to the Atlantic and Great Western Railroad Company."

This is true, provided you further find that the plaintiffs furnished the cars to the Oil Creek Railroad Company for transportation as their cars. Under such circumstances, of course, payment of wheelage to the other railroad companies by the Oil Creek Railroad Company would not deprive the plaintiffs of their right to have the cars transported over the road subject to the payment of tolls only.

The evidence that wheelage was paid to the other railroad companies for the use of the cars (or tending to show this) was heard only for the purpose of shedding light upon the important question: Who did furnish the cars?

"Sixth. If the jury find from the evidence that the payment of mileage *by the defendant to the Erie Railroad Company and to the Atlantic and Great Western Railroad Company was merely a settlement between different roads for the excess due in the use of each other's cars, then the payment of mileage was not, in itself, a rental of the cars."

As stated, this is true. Of course the payment of mileage or wheelage was not, of itself, a rental of the cars, but such payment is evidence bearing upon the question above stated: Who did furnish the cars?

"Seventh. If the jury find from the evidence that any part of the money paid by the plaintiffs to the defendant was illegal charges, and that the same had to be paid in order that the plaintiffs could secure possession of their oil, which was held for such payments by the Erie Railroad Company, that the risk of fire and evaporation and leakage was great, and the necessity for possession urgent, then the plaintiffs are entitled to recover back such charges illegally claimed and paid."

This is true. Money illegally collected by the Oil Creek Railroad Company from the plaintiffs (if any was so illegally collected) by stress of such circumstances could not be regarded as having been voluntarily paid and might, therefore, be recovered back.

"Eighth. If the jury believe that the oil consigned to E. McKenzie, or to the agent of the Oil Tank Company, and which the plaintiffs claim as their oil, was the oil of the plaintiffs, and that they paid freight, then it is immaterial that the cars in question were not consigned to them by name."

This is true. Consigning the oil in any other name than the plaintiffs' would be unimportant if the oil belonged to them and they furnished the cars to the railroad company to transport it.

"Ninth. The evidence fails to connect Doan & Company with Root & Rust. Their action at Corry, therefore, either in the pay-

[*Original Edition, p. 149.]

ment of the charges of the Oil Creek Railroad Company for transporting the oil and receipting for the goods does not affect the plaintiffs' claim."

"Tenth. If the jury believe that Doan or Doan & Co., or the Oil Tank Company, in paying the charges of the Oil Creek Railroad Company and receipting for the oil at Corry, acted as agents for the Atlantic and Great Western Railroad Company, and not for the plaintiffs, then their action in no way affected the claim of the plaintiffs."

This is also true. The evidence showing that the oil was way-billed to Corry, the terminus of the Oil Creek Railroad, and freight there paid (sometimes by Doan & Co. and sometimes by others), was admitted as part of the transaction of shipping the oil in the hope of shedding thereby some light upon the transaction itself and the relations existing between the plaintiffs and the Oil Creek Railroad Company.

And now the defendant asks us to say:

"First. That if the jury believe from the evidence that the Oil Creek Railroad Company owned the cars in part and furnished the other cars *for the transportation of oil to plaintiffs, which others were owned by other railroad companies and for which the Oil Creek Railroad paid car service or wheelage, then the law made no restrictions as to charges and the plaintiffs cannot recover."

And we do say so. This is correct.

"Second. If the jury believe from the evidence that the plaintiffs did not pay any money to defendants, or to the Oil Creek Railroad Company, for the transportation of oil, but that the charges of the Oil Creek Railroad Company were paid by other parties, or by other railroad companies, then there is no privity between the plaintiffs and defendants, and the plaintiffs cannot recover."

This is true, provided the other parties and the other railroad companies here referred to did not pay the Oil Creek Railroad Company for the plaintiffs—on their behalf. If, however, these other parties and other railroad companies acted in this respect for the plaintiffs, or if the Erie Company, in collecting the money at Jersey City, represented the Oil Creek Railroad Company and collected the money on its account, then the payment referred to should be regarded as payment by the plaintiffs to the Oil Creek Railroad Company.

"Third. If any payments were made by the plaintiffs to the Oil Creek Railroad Company, and if they were voluntary payments, made under a claim of right, upon the part of said company, then no recovery back can be had from the defendants in this case for such payments, and the plaintiffs in this case must fail."

This is true if they were voluntary payments. But, as we have before stated, a payment made under stress of circumstances, as to avoid impending danger of loss, would not be a voluntary payment.

"Fourth. That the only limitation in the act of 1849, to which the Oil Creek Railroad Company was subject, was as to the rates of toll; that there was no limitation as to freight that the company, as

[*Original Edition, p. 150.]

the owner of a highway, were authorized to charge for the use of the same, said toll not to exceed a certain limit; that as a transportation company it was not limited as to the freight charges for the transportation of freight; that if the evidence shows that plaintiffs paid the sums for which this suit is brought, as freight, they cannot now recover, and the verdict should be for the defendant."

This is true, provided the oil was shipped by plaintiffs "as freight," or, if it was not so shipped, then provided the plaintiffs paid the money "as freight" voluntarily.

"Fifth. That the act of 1849 is a general law, and a payment in excess of the charges and rates fixed by that law, in ignorance of such limitation, would be payment under a mistake of law, and, as the plaintiffs state the money paid in this case was paid in ignorance of said law, the verdict should be for the defendants."

*We cannot instruct you as here requested; the evidence does not warrant it.

"Sixth. If the terminus of the late Oil Creek Railroad was at Corry, and it had no connection with the Atlantic and Great Western Railroad Company, and if evidence shows that the oil in controversy was shipped to Corry as a terminus of the shipment, then the freights were paid and the oil rebilled and shipped to New York; there is no privity between the defendants and the Erie Railroad Company, to whom the money was paid, and the plaintiffs cannot recover, and the verdict should be for the defendants."

"Seventh. That if the oil in controversy was delivered at Corry to Doan & Co., and the freights paid, the receipt of the oil would end the shipment, and the payment to the Erie Railroad Company would not be payment to the defendants, and no action can be maintained for money so paid against defendants, and the verdict should be for defendants."

What is here asserted is true; but if it was the course of business at Corry for the Atlantic and Great Western Railroad Company, or its agents (and you will judge whether Doan & Co. were its agents in this respect) to pay the charges of the Oil Creek Company at that point, the same being again paid by the Erie Company, who finally collected them from the plaintiffs—by means of their hold on the possession of the property—then the payment of the Atlantic and Great Western Railroad Company to the Oil Creek Railroad Company at Corry, was a payment on behalf of the plaintiffs. A railroad company has by law a lien on the property it carries, and can compel payment of its proper charges by retaining possession.

And when connecting roads pass such property from road to road, under a custom of each receiving road paying the prior charges of the others, the last collecting the whole from the consignee, the prior payments enure to the benefit of the consignee, from whom the money is thus finally collected, and will be treated precisely as if they had been paid by him directly.

"Eighth. That the answer to the bill of discovery put in evidence

[*Original Edition, p. 151.]

by plaintiffs themselves, is evidence in all its parts for the consideration of the jury."

This is true, and the whole of the answer should be carefully considered; but the jury may credit one part of it, and not another, if in their judgment, upon examination of the entire case, it is proper to do so.

"Ninth. Unless the jury can find from the evidence that the plaintiffs owned or controlled, as their own property, specific cars, and so owning and controlling the same, tendered them for transportation by the Oil Creek Railroad Company as such private cars, the verdict must be for the defendants."

This is true. The language, however, must not be misunderstood. *It is not necessary to find that the plaintiffs owned the cars, but that they owned the use and had the control of them, as of their own property; and having such use and control, furnished them to the Oil Creek Railroad Company for transportation, as their (the plaintiffs') cars, for the time being.

"Tenth. To sustain a verdict for plaintiffs, it is required that the Oil Creek Railroad Company should have been informed by plaintiffs that the cars were private cars, owned or controlled by plaintiffs, and that such cars should be tendered for transportation, as such private cars of plaintiffs."

To this we answer: To authorize a verdict for the plaintiffs it is necessary that the Oil Creek Railroad Company should have been informed, or otherwise had knowledge, that the plaintiffs owned the use, and had the control of the cars, as before stated (in answer to the preceding point), and that such cars were furnished by the plaintiffs for transportation as theirs (the plaintiffs' cars), for the time being. For if the company had not such information or knowledge, and were thus allowed to and did regard and treat the cars as belonging to and under the control of other railroad companies, compensating such other companies for their use while on the Oil Creek Road, along with other cars of such other companies used there, then the plaintiffs cannot complain that they were charged freight instead of toll.

"Eleventh. That the fact testified to by plaintiffs themselves, that they had no knowledge that owners of private cars had any special rights as to rates of transportation, is evidence which the jury should consider in determining whether plaintiffs ever tendered any cars for transportation as private cars, owned or controlled by themselves."

If the plaintiffs had no knowledge that persons owning cars, or owning the use and having the control of cars, had special rights as to rates of transportation, this fact should be considered in determining whether the plaintiffs did tender any cars as their own, for transportation; whether the plaintiffs had, or had not such knowledge (in regard to the rights of persons owning, or furnishing and tendering cars) the jury will judge; and in so judging will particularly remember whatever the plaintiffs themselves have said on the subject.

Now, gentlemen, we return to the questions stated at the outset.

[*Original Edition, p. 152.]

First, did the plaintiffs ship oil over the Oil Creek Railroad—in other words, did they own the oil which was consigned to them, when it started on its journey? You will consider the evidence bearing on this question—to which the counsel for the respective parties have referred you—and determine how it should be decided. If you find that they did ship the oil, then,

Second, were they overcharged? This, as we have seen, depends upon whether they were liable to a charge of freight, or merely of toll. And this again depends upon whether the plaintiffs furnished simply the *oil and tanks, or furnished the cars also, to the railroad company, as their cars for the time, to be hauled for them (the plaintiffs) over its road.

In passing upon this question, you will bear in mind the plaintiffs' allegations—that the Oil Tank Company procured from the Erie and other railroad companies a number of platform cars, of which it obtained the use and control in consideration of mounting them with tanks, and keeping them employed in the transportation of oil; that the Oil Tank Company after so mounting the platforms with tanks, rented or hired the cars thus mounted to the plaintiffs; that after the Tank Company sold out to the Erie Company, the Erie Company continued so to rent or hire these cars to the plaintiffs, charging about one hundred dollars per car for its use, each trip, with a guarantee against waste; that the plaintiffs, having thus obtained the use and control of these cars, loaded them with oil and tendered them to the Oil Creek Railroad Company, to be hauled over its road, as plaintiffs' cars; that when passing over the road they were under the care of agents of the Tank Company, and that the railroad company charged for returning the empty cars, as it would not have done if the cars were its own, or in its use.

To these allegations of the plaintiffs the defendant makes an emphatic denial. It says the railroad companies who allowed their platform cars to be mounted with tanks, did not give up or part with the use or control of such platform cars, but employed them afterwards to carry oil as freight, just as they had employed their cars before to carry such freight; that the tanks mounted on cars, simply took the place of barrels previously used; that they were a substitution merely of large vessels, to be carried upon their cars, for the smaller ones previously carried—for the mutual benefit of both parties; that the money paid the Tank Company was for the use of its tanks, and its guaranty against leakage and waste; that the Oil Creek Railroad Company paid the Erie and other companies for the use of these cars, under the title of wheelage, after being mounted with tanks, just as it paid for all other cars, belonging to other railroad companies, used by it to carry freight over its road; and therefore, that it, the Oil Creek Railroad Company, and not the plaintiffs, furnished the cars—the plaintiffs furnishing merely the vessel in which their oil was confined; that the charge on returning cars to the oil region was on account of the tank alone, and in place of the former charge for returning empty barrels.

[*Original Edition, p. 153.]

You have heard the testimony adduced by the parties to support their respective allegations. It has been several times very fully cited by counsel on the one side and the other; and further repetition of it by the court would not aid you.

Examining it with great care—bearing in mind the comments of counsel, and also remembering that the burden is on the plaintiffs, in the first instance to prove the truth of their allegations, for this is so—you will determine how this important question should be decided. How did the parties themselves understand the matter at the time? Examine their acts, *as well as all the circumstances attending the transaction, and see whether you can determine; for if you can this will greatly aid you.

If you do not find that the plaintiffs owned the use and had the control of the cars, as they allege, and furnished them to the railroad company, to be hauled over its road for them as their (the plaintiffs') cars, then, as we have before said, they were not overcharged, and cannot, therefore, recover. If, however, you do find they owned the use and had the control of the cars, and furnished them to the railroad company, to be hauled over its road as their cars, then they were liable only for tolls, and have, therefore, been overcharged. And in this event it will be necessary to ascertain how much the overcharges amount to. In this connection, to avoid trouble and uncertainty, the defendant has, very properly, admitted, that if the railroad company was liable only for tolls, not freight, the overpayment on the oil which the plaintiffs claim to have shipped is \$88,259.74.

This admission, however, must not be misunderstood; it is not an admission of overcharge, but (while asserting their right to charge freight) the defendant admits simply, that if limited to tolls, their charges would have been \$88,259.74 less than they recovered. And this the plaintiffs accept as the true amount. If, therefore, you find that the plaintiffs were liable for tolls only, you will readily ascertain the extent of overcharges on that account.

The plaintiffs, however, in addition to the sum above stated, with interest, claim \$2,573, which they say was improperly charged them for returning cars from Corry to the place of lading. You will judge and determine whether the evidence sustains this additional claim.

Whatever you ascertain the amounts of the overcharges to be (if you find any such overcharges), the plaintiffs will be entitled to recover with interest; provided you further find, as before indicated, that these charges were paid by the plaintiffs to the Oil Creek Railroad Company directly or indirectly; and provided also, you further find, that they did not pay it voluntarily. As we have before explained, if they were virtually forced to pay, by stress of their situation, then the payment was not voluntary.

Now you will take the case, and examining it with the patience and care, which the large interests involved demand, will decide it—casting from you, as dangerous to be remembered, every suggestion you may have heard tending to excite sympathy for the one side, or prejudice against the other. It is of no importance what-

[*Original Edition, p. 154.]

ever, whether the plaintiffs' enterprise was profitable or otherwise. And it is of as little consequence, that one of the parties is composed of individuals, and the other a corporation; each is entitled to a fair and impartial trial—a trial upon the law and evidence alone. If anything else is allowed to influence our deliberations, injustice will be done to the one or the other of the parties, and greater injustice even to yourselves.

The jury found a verdict for the plaintiffs for \$118,106.77.

***Orphans' Court, Juniata County.**

In re ESTATE OF ROBERT GALLAGHER, Deceased.

Where a testator devised real estate to his widow for life, directing it to be sold on her death and the proceeds to be distributed, and the widow declined to take under the will, petitioning for partition and valuation under act of April 20, 1869 (Brightly, 530); *Held*, 1. that the court had jurisdiction in such a case; 2. that the sale could take place immediately, without awaiting her death; 3. that the legatees cannot take at their valuation unless all are agreed.

PER CURIAM.

JUNKIN, P. J.—The testator by his will said: "I give and devise unto my said wife for and during the term of her natural life, my mansion, farm, etc. . . . At the death of my wife Jane, I direct the said real estate to be sold," and then divides the proceeds among his collateral heirs, as he had no children of his own. He then empowers his executor to sell said real estate, make conveyances, and appoints Joseph Rothrock executor. Will dated 30th March, 1872, and proved within thirty days thereafter. The widow declined the provisions of the will, and elected to take her statutory allowance, and petitioned the Orphans' Court, under the act of April 20, 1869, Brightly's Purdon, page 530, for partition and valuation, which was granted, and upon the return of the inquisition, the residuary legatees denied the jurisdiction of the court in the premises, and resisted confirmation.

Had the court jurisdiction? Undoubtedly, under the above cited act, and the question is really not one of jurisdiction, but simply of administration, viz.: how shall the provisions of the act be carried out? Even this is readily answered. We must proceed as to the widow as if there was no will, and as to the legatees under its provisions: in short, we must mould the proceedings so as to give her all she is entitled to in cases of intestacy, and distribute according to testator's intentions.

The life-estate of the widow under the will is gone, and may be considered out of the field: *Brown & Sterrot's Appeal*, 3 Casey, 62, it is merged in the greater estate of the executor. The postponement of the sale until her death was for her benefit; she has waived it, and there is now nothing in the way of an immediate sale. Same case and *Gast vs. Porter*, 1 Harris, 533. The fund, or the interests of the legatees may be preserved in two ways: first, by the executor accepting at the valuation, and thus the dower of the widow is admeasured, the title remains in him for all the purposes of the trust, and on the decease of the widow he may execute the

[*Original Edition, p. 155.]

power of sale; or inasmuch as the widow's life-estate is out of the way, there is no longer any reason for postponing the sale; and she having hastened this result, cannot complain, nor can the residuary legatees that they come speedily into the inheritance.

But I do not think that the legatees can take at the valuation unless all agreed to do so, which would then be an election to take land instead of the proceeds; a sale is required to place them on a basis of equality, and is a closer execution of the will.

*Unless this proceeding is sustained, the widow is practically outlawed, for she cannot go into the Common Pleas on the law or equity side: *McNickle vs. Henry*, 28 Legal Int. 44, per Sharswood; her only remedy is under this act of April 20, 1869; *Neeld's Appeal*, 20 Smith, 113.

And now, April 27, 1874, inquisition confirmed, with the usual rules granted, etc.

Court of Quarter Sessions, Schuylkill County.

COMMONWEALTH vs. WILLIAM CEARY.

1. In an indictment where a felony and a misdemeanor are joined, neither the defendant nor his wife is a competent witness, under the act of April 3, 1872.
2. Where the verdict is not in itself insensible, it is not vitiated by the finding of superfluous matter by the jury.

Opinion delivered March 23, 1874, by

WALKER, J.—By the provisions of the act of assembly of April 3, 1872, P. L. 34 (Pur. Dig. vol. 1, p. 625, pl. 21), in the trials of indictments for offences, not above the grade of misdemeanor, the defendant is made a competent witness, and the wife of a defendant, without any doubt, can in such cases be a witness for him.

In the present case the indictment charges the defendant in one count with a felony and in the others with a misdemeanor. The felony is an aggravation of the misdemeanor here. The joinder of a misdemeanor with a felony in separate counts in one indictment where they grow out of the same offence, though different in degree, is proper. The defendant therefore being unable, at common law, to testify for himself is not rendered competent by this act of assembly in cases of felony, and we think by a parity of reason, his wife is also incompetent.

As regards the motion in arrest of judgment, for the reason that "the court cannot pass judgment upon either verdict, being verdicts of distinct offences," we can only say that the verdict of the jury was "guilty upon the first and second counts and not guilty with intent to kill," and means guilty as the defendant stands indicted except upon the fourth count where the jury find the defendant not guilty. It is, therefore, but one verdict on the two counts. This is a substantial finding, and might have been moulded into four, if necessary: *Beates vs. Retallick*, 11 Harris, 288, but under the ruling of *Girts vs. Commonwealth*, 10 Harris, 351, we think is sufficient as recorded.

The verdict is not in itself insensible, and is not vitiated by the finding of superfluous matter by the jury: *Fisher vs. Kean*, 1 Watts,

259. Surplusage is as innoxious in criminal as in civil proceedings: *Commonwealth vs. Frey*, 14 Wright, 249; *Dawson vs. People*, 11 Smith. (N. Y.) 399 and 408.

Therefore motions overruled.

*Orphans' Court, Philadelphia.

SHIVER'S ESTATE.

The words "leaving no issue," coupled with the words "in case of the decease of either of them," would primarily be construed to mean not death at an indefinite time, but this rule may be made to bend before the intent of the testator.

Exceptions to auditor's report. Opinion delivered May 4, 1874, by

LUDLOW, J.—In addition to what has been said by the auditor in this case, we add the following: Under a well settled rule of construction, it seems to us to be clear that the real estate possessed by the testator passed to his daughter Amelia in fee tail, and as she died without issue, her brother James took a vested estate, which by his will passed to his widow.

We consider the fund in court arising from the sale of the real estate, as real estate, for although the land was sold, it never was in point of law converted into personalty.

The disposition of the personal property of testator under this will presents another question for our consideration. Unquestionably, the words "leaving no issue," coupled with the words "in case of the decease of either of them," would primarily be construed to mean not death at an indefinite time, but at a fixed and definite period, as at the death of the testator or of the life tenant.

But even this rule, when most rigidly applied, is made to bend before an intent, and an examination of the text books and authorities upon this subject, will, we think, prove that the intent may be established by the existence of additional limitations which depend upon other contingencies than those implied by the words "in case of the decease of either of them," or "in case of death" and the like. Smith on Ex. 838-9-347; and Powell on Devises, Chap. 27.

Herein lies the difference between this case and *Umstead & Reiff's Appeal*, 10 P. F. S. p. 365, which at first reading does appear to rule this cause.

In *Umstead & Reiff's Appeal* the general rule was applied, because no words appeared in the will from which it could be inferred that a death without issue during the life of the tenant for life was not intended. Where the contrary appears to be the intent, the rule gives way.

In this instance, the testator intended his son James, in a certain contingency, to be the ultimate object of his bounty, if his daughter died without issue, or if she had issue and they died in their minority.

In the case above cited, and the authorities cited in it, the alternative limitations over, were to a class, and not to a specific indi-

[*Original Edition*, p. 157.]

vidual. In *addition to this, while no trust arose during the life of the widow, at her death a trust was created, the object of which seems to have been to secure the capital to answer the limitation over, in the event of the death of the daughter, or of her death without issue of lawful age, and this last provision seems especially to contemplate a falling in of the share to James, for he shall take if said issue die in their minority. On the whole case, we are of the opinion that the auditor was right in the conclusions arrived at by him, and we therefore confirm his report.

Exceptions dismissed and report confirmed.

Court of Common Pleas, Butler County.

BIRD vs. SHIRK.

Where a sheriff makes sale on a *fi. fa.*, of leasehold property subject to mechanics' liens, and pays over the money to the *fi. fa.* creditors on the day of sale, or at any other time before the return day of the writ, he is liable to mechanics' lien creditors for claims filed after the return day, if in other respects within time. The sheriff is presumed to know the law, and is bound to take notice of such claims from the nature of the property sold, and if he misappropriates the money derived from such sale, he is liable to mechanics' lien creditors.

Exception to auditor's report of distribution of proceeds of sheriff's sale. Opinion delivered April 28, 1874, by

McGUFFIN, P. J.—This controversy arises upon the distribution of the proceeds of a sheriff's sale of a leasehold and oil well, and all the necessary machinery appurtenant thereto. The money was paid over by the sheriff upon the day of sale, and before the return day of the writ, to the *fi. fa.* creditor, who was also the purchaser at the sale. The auditor appropriated the money to the judgment of Ephraim Tucker, whose claim was for work and labor done for the defendant in drilling the well, which commenced before the entry of the judgment and issuing of the *scire facias* and was completed on the day after the sale on said writ. The lien was not filed of record until the 10th of June, 1873. The work commenced on the 12th of August, 1872, and was continuously pursued until completion on the 13th of March, 1873. The sale was made on the 12th of March, 1873, and the money paid over by the sheriff on the same day. The return of the writ was not made for nearly two months thereafter. The auditor finds the claim of Tucker to be regular and just, and that no allegation of fraud attached thereto, and that no objections to any irregularities in the proceedings were raised by the defendant, and that a judgment was obtained in open court for the amount of his demand upon his mechanics' lien filed, and that thereby he has a lien upon the fund arising from the sale of the premises by virtue of his prior lien for his labor. It is, therefore, claimed that the sheriff misapplied the funds in appropriating the money to the *fi. fa.* creditor, that he was too hasty in making payment *and disobeyed the command of the writ before the return day thereof. The answer is—the sheriff had no claim of notice upon the claim of Tucker, as it did not appear of record, and to compel him now to answer would work injustice to him,

[*Original Edition, pp. 158 and 159.]

and that the auditor erred in his report in appropriating the funds to the claim of Tucker. There can be no doubt that the lien began on the 12th of August, 1872, and the work was continuously carried on until the 13th of March, 1873. The claim was complete at that time, and although no record thereof was filed in court until the 10th of June, 1873, still under the act of assembly, the lien was preserved in full force on the 12th day of March, 1873, at the time of sale, the law providing that he had three months after the last work was done in which to file his lien. This is conceded, but the sheriff, it is alleged, had no proper notice of the claim, there being nothing on file to show the demand, and therefore he can only look to the record in making distribution. The case, then, depends on the question of notice. We may remark we entertain the opinion that this presents one of those continuing liens, and like some other liens under the act of assembly, which the sheriff, from their nature, is bound to notice, and something like the lien of a mechanic for work and labor done on a chattel, which the sheriff cannot levy upon and carry away without securing the lien of the workman for his labor. The law fixes the lien for the protection of the laborer. The sheriff is bound to know the law, and is presumed to understand it. The law fixes a lien for the protection of the laborer from the inception of his work until its completion and for three months thereafter: 10 Harris, 491; act of assembly, 18th of April, 1868, and supplements thereto. He has evidence before his eyes, when he goes upon the premises to levy, and every hour of labor creates a right of lien. He also knows that the mechanic is not bound to file his lien for three months after his work is completed, and when he sees the work progressing, it is notice to him of the claim which may be filed, and can be filed, and for which demand in judgment, he may be called upon to appropriate the proceeds of the writ. The mechanics' lien law in Western Pennsylvania was passed for the very purpose of securing the mechanic and workman who labors upon an oil well, and to facilitate the development of the oleaginous product in the country. The sheriff of Butler county knows these facts as well as any other man in the county, but, aside from his general knowledge thereof, the sheriff in this case had notice of the fact of the drilling going when he made the levy in this case; for the levy endorsed upon the writ is in these words: "Levied upon all the right, title, interest and claim, etc.,—describing the land by its boundaries—and an oil well being drilled thereon, together with all the machinery and fixtures," etc. He, therefore, had knowledge sufficient to put him on his guard, to prevent him paying out the money, and to induce him to bring the same into court for a legal distribution thereof. If he will not take such notice, he proceeds at his *peril. Of course he takes all the consequences of his acts. In this case, however, he cut off all opportunity from the party to take such steps as would protect him, having paid the money out two months before the return day of the writ, without waiting any action of the court with reference to its application: 9 Barr, 267. We see no reason why the money should not be applied to the judgment of Tucker. If there has

[*Original Edition, p. 160.]

been any irregularity in obtaining the judgment, that is a matter for the defendant who makes no objections given to us. It is not the judgment that gives the lien, but it is the labor performed; and the lien by law arises therefrom. This may be considered a hard rule and inconvenient in practice, and imposes more duties upon the sheriff than are just. It must be remembered that the sheriff is bound to obey the command of the writ. He is required after sale to return the same and the money into court, and not to pay it to the plaintiff named in the writ, so that the rights of others may be protected. When he undertakes to go beyond this, he does so at his risk. I am aware that it is customary often so to do, but it is always at his peril. Here the sheriff has a writ for \$3,600, takes a levy of everything he finds belonging to the defendant, and knows the result would be an entire sale of the property.

At the time he levied he found Tucker at work drilling on the well, on the 5th and on the 12th, seven days intervening, at the rate of \$400 per day. He knew Tucker had a lien to the extent of \$2,800 at least, yet he sells the well and all the property, receives his costs, and pays over the residue to the plaintiff, thereby divesting all claims upon the well, and leaves the driller to look after the defendant not only for the amount previously earned, but that which he earned between the day of levy and sale. Where is the protection to the driller? This the sheriff knew was the result. These are the facts his attention was called to, because the law created the daily lien and said to the sheriff: You must apply the proceeds of your writ to the extent of the money due the driller, because his lien is older than your writ and levy. It is true he might reply: there may be nothing due him; he may have been a partner of the defendant; there may be nothing due at the time of levy. These inquiries may create doubts and controversies. These very inquiries we hold should have compelled the sheriff to refuse to pay the money to the plaintiff, and thus he would have compelled the driller to see the sheriff and his sureties and drive him into unnecessary litigation. Still that would not divest the lien upon the fund, but he is entitled to the proceeds to the extent of his claim. As we look at it, to hold any other rule would put workmen who rely upon their lien to great hazard, and place them without protection, and, hence, we are satisfied the conclusion of the auditor is correct, and without citing other authorities in support of the position taken by him, we confirm the report.

By the court.

***Court of Common Pleas, Lancaster County.**

LOEB vs. NISSELEY.

Until a person encloses his land, or part of it, he cannot legally be called upon to pay any part of the expenses of building fences by persons adjoining his land on either side.

Case stated. Opinion delivered April 18, 1874, by
LIVINGSTON, P. J.—The case stated finds that Loeb purchased four adjacent lots of ground in Lancaster city, containing together in
[*Original Edition, p. 161.]

front on North Shippen street 88 feet, and extending in depth 245 feet to a public alley, of which he obtained possession in April, 1873. That Nissley purchased three adjacent lots of ground in the city of Lancaster, adjoining those of Loeb, and containing together in front on North Shippen street 66 feet, and extending in depth 245 feet to a public alley, and also obtained possession of them in April, 1873. None of these lots at the time of their purchase had fences or other improvements of any kind upon them. After the parties had obtained their deeds and possession of their respective lots, Loeb wrote to Nissley, informing him that he, Loeb, intended to enclose his lots, and requesting Nissley to make half the partition fence between them; this Nissley refused to do, and stated that he would not improve nor enclose his lots. After this refusal Loeb proceeded to enclose his lots, and in doing so made the whole of the fence on the line between his lots and the lots of Nissley at his own expense, and brought this action to recover half the expense of making it from Nissley. Nissley never fenced his lots, and they remain open commons now.

The 3d section of the act of March 11, 1842, declares that "When any two persons shall improve lands adjacent to each other, or where any person shall enclose any land adjoining to another's land already fenced in, so that any part of the first person's fence becomes the partition fence between them, in both these cases the charge of such division fence, so far as is enclosed on both sides shall be borne equally and maintained by both parties;" and the 4th section of the same act provides for the view and examination of any line fence, and a certificate from the viewers what proportion of the expense of building a new or repairing old line fence should be borne by each party, etc. And the ordinance of the city of Lancaster (p. 65) regulating partition fences, provides that the city regulators, or any two of them, shall have full power to regulate partition fences in the city; and where the adjoining parties do improve or enclose their lots, the partition fences shall be made in the manner generally used, and shall be kept in repair at the equal cost of the parties, so that the *price for making such fence shall not exceed \$5 for every hundred square feet, unless the owners or possessors between whom such fence is, or shall be erected, do agree otherwise. And if either party between whom such partition fence is, or shall be made, shall neglect or refuse to pay his part or moiety for the repairing or setting up such fence as aforesaid, then the party at whose cost the same was so repaired or set up, may have his action before the mayor, recorder, alderman, or any justice of the city, for the recovery of the moiety for such costs.

We are now asked to decide whether, under the facts in the case stated, Nissley, the defendant, is legally bound to pay half the cost and expense of erecting the fence made by Loeb. That he is not at present, is very evident. That he, his heirs or assigns, will in the future be, scarcely admits of a doubt.

The act of assembly limits such liability to two cases. 1. Where any two persons shall improve lands adjacent to each other.

2. Where any person shall enclose any land adjoining to an-

[* *Original Edition*, p. 162.]

other's land already fenced in (as would be the case if Nissley would now fence and enclose his lots), so that any part of the first person's fence becomes the partition fence between them.

And the ordinance limits to the case where adjoining parties do improve or enclose their lots.

In *Dysart vs. Leeds*, 2 Barr, 488, the Supreme Court says: "An occupant is not bound to join in a division fence. He may set his fence, if it please him, not on the line of division, but within it, and if his neighbor extend his fence across the line to join, it is a trespass." So in *Painter vs. Reese*, 2 Barr, 126, where a partition fence was destroyed by a flood, the Supreme Court says: "That in such case either party may recede from the former line and erect a fence on his own land, leaving the intervening space open to the public, in which case he is not bound to maintain the former fence."

And in *Rohrer vs. Rohrer*, 6 Harr. 367, where a lane existed between the lands of A and B, and A, claiming the lane as his land, removed the fence so as to include the lane, and B placed his fence back so as to exclude the lane and leave a lane on his own land, which was left open at each end, and was used by A and such others as chose to do so. The Supreme Court say "that A could not recover from B the one-half of the cost of the fence made by A along the lane; the lane was no longer improved land within the meaning of the act, and the fence viewers had no jurisdiction of the case."

In this case, until Nissley encloses his land, or part of it, he cannot be called upon legally, to pay any part of the expense of building fences by persons adjoining his land on either side.

Judgment is therefore entered for the defendant as provided for in the case stated.

*Court of Quarter Sessions, Lancaster County.

ROAD IN EAST HEMPFIELD TOWNSHIP.

Upon presentation of petition asking for the appointment of road viewers for a double purpose after their appointment, the Court of Quarter Sessions has full power to allow such amendments in said petition as will remedy defects.

Exceptions to report of viewers. Opinion delivered April 18, 1874, by

LIVINGSTON, P. J.—At April sessions, 1873, a petition was presented asking the court to appoint viewers to view and widen a public road, leading from a point on the Harrisburg and Middletown turnpike, at Landisville, to the Spring Mill school house; also, to view, widen and change into a public road, a private road from Spring Mill school house, to a point on a public road running from the Marietta turnpike to Salunga, all in East Hempfield township.

Viewers were appointed by the court, and, on May 19, 1873, an affidavit was made by H. C. Lehman, filed and presented by his counsel, Mr. Eby, and a rule was granted to show cause why the appointment should not be revoked.

On June 20, 1873, on the rule being called for argument, the

[*Original Edition, p. 163.]

counsel for petitioners asked leave of court to amend their petition by striking out of it everything relating to the road first therein mentioned, and making the petition to read, "that your petitioners labor under great inconvenience on account of the want of a public road of proper width, starting from Spring Mill school house, to a point on a public road running from the Marietta turnpike to Salunga;" virtually making it a petition to view and lay out a public road between the two points therein mentioned. To this motion to amend, no objection was made by Mr. Lehman's counsel, who stated that he was only interested so far as the road first mentioned in the petition was concerned, and if that was stricken out of the petition he had nothing further to do in the matter.

The court suggested that a new petition should be prepared and presented, but, counsel persisting in his motion, and there being no further opposition, he was allowed to amend, and the court directed a new order to issue embracing only the road asked to be viewed in the petition as amended. Such order was then issued, the viewers met, viewed the ground, and report that they have viewed, laid out and do return for public use a road between the two points stated in the petition, as amended, and in the order issued to them; their report being confirmed *nisi* August 19, 1873.

To this report exceptions were filed by Mr. Eby, as attorney for *Chn. Nolt et al.*, on September 13, 1873, and on November 19, 1873, a petition was presented asking for the appointment of re-viewers in case the exceptions were overruled by the court.

*Most of these exceptions, however, relate to the original petition prior to the amendment, and the only real point presented in this case is: "Had the court power to allow the petitioners, by their counsel, to amend the petition as hereinbefore stated?"

The *Sheaffertown Road*, 3 Watts, 475, was a case of re-view. It was there decided that a petition for the re-view of a road should be signed by persons in interest, and not by their attorney, and that it was not error for the court to refuse to grant a re-view upon the petition of an attorney. And the reason given is, that there should, in cases of re-view especially, be some one on record liable for costs, as the re-view is to be granted at the expense of the party applying for the same. The court below refused to grant a re-view on such petition, and the Supreme Court affirmed the proceedings; but in delivering the opinion, says that, "if this petition had been acted on, and a re-view granted, and a report of viewers made, and we were asked to reverse the proceedings because the petition for a re-view was signed by the attorney, it would present a different question, and on that no opinion is given."

In *Harvey vs. Lloyd et al.*, 3 Barr. 340: In proceedings to open a railroad from mines to public works, the petition was in the name of the owners, and the names of all the owners were put to the petition by one John Bennett, their agent and lessee, and the court say: We deem this a substantial compliance with the act of the legislature, which requires the proceedings to be in the name of the owners.

And in *Sharrett's Road*, 8 Barr. 89, it was decided that a petition

[* *Original Edition*, p. 164.]

for the assessment of damages sustained by reason of laying out and opening an alley, in the name of the owner of the land through which it passed, and signed for him by his agent as such, is a sufficient compliance with the act of assembly.

In the case before us the petition was signed by the petitioners themselves, the proper parties; they are on record, liable for any costs that may be incurred in these proceedings; they employ counsel to represent them, and by and through their counsel they asked the court to allow them to amend their petition. The court permitted the amendment to be made, and directed a new order to be issued in accordance therewith, and the report is in conformity with the order.

We think the court, under the decisions above cited, was fully authorized to permit the amendment. We, therefore, overrule the exceptions, and will appoint re-viewers upon the petition presented for that purpose.

***Supreme Court of Pennsylvania.**

(*At Nisi Prius.*)

ROSE vs. CITY OF PHILADELPHIA.

The city is liable for the killing of a boy in the building of a bridge, although it was built by contract, where the work is intrinsically dangerous.

Charge delivered *February 21, 1874*, by

SHARSWOOD, J.—Gentlemen of the Jury: This is an action brought by Ann S. Rose to recover damages for the loss of her son, John R. C. Rose, who was killed on the 25th of August, 1871, it is alleged, by the fall of a wedge from one of the trestles supporting the eastern span of the Girard avenue bridge.

The action is based upon the alleged negligence of the officers and servants of the city of Philadelphia. This action could not have been maintained a few years ago, but an act of assembly, approved April 15, 1851, recognized the right, and very properly. The questions which you are to determine are, first, whether the death of the plaintiff's son resulted from the falling of the wedge? To this fact one witness for the plaintiff swears positively that it did strike him on the head, and of this witness there is no contradiction. The only thing that raises a question as to this is, whether a wedge of the weight described, twenty-five pounds, could fall from such a height without producing more than a mere abrasion of the skin. We have no light shed upon this question by a post mortem examination, by any surgeon or physician. If the wedge did not strike him at all, then we have no evidence except that he lost his balance on the boat, fell overboard and was drowned. I cannot say to the jury that they are bound to assume that this wedge could strike him without producing more than an abrasion. If he fell over accidentally and was drowned, then there can be no recovery.

In the repairs to the bridge the work was done under a contract, under a plan. The general principle is, that if one employs another to do any work—for example, to build him a house and de-

[**Original Edition*, p. 165.]

livers it over to him to complete, the responsibility of the employer does not exist for the negligence of the contractor or his employées. There are some exceptions, however, to this doctrine. It does not apply where employers retain the control of the work, neither does it apply where the work is intrinsically dangerous, when the plan of the work is such that the same danger exists after completion as while the work is going on. Take the case of a bridge. Here is a bridge (I do not say this one), the repairs to which are so constructed, that after it is finished, the wedges provided for in the plan and *an inherent part thereof, will require to be driven or hammered in two or three times a day in the same manner as while the repairs are going on. The employer in such a case would be liable; in other words, if the defect or want of skill is in the plan prescribed by the employer or contractor, and not in the manner in which the work is performed, then the employer is responsible for the defect, whether the injury results from the negligence of the contractor or his servants. Mr. Kneass agrees, that if the plan does not provide for a foundation it would be defective. There is a provision made on the plan for the use of wedges. It is admitted, that unless the trestles rested upon solid foundations the wedges would have to be driven at least once a day. It is for you, gentlemen of the jury, to apply these principles to the facts in the case, and if, from the consideration of all the evidence, you should be of opinion the plaintiff should recover, then the question will be, what amount of damages will you adjudge? It should be compensation for pecuniary loss only. No compensation whatever should be allowed plaintiff for her sorrow on account of the loss of her son. The damages are to be simply compensation for the loss of his services in contributing to her support. You have heard the evidence as to the age of the parties, and that he would probably outlive his mother, and he would probably have supported her through life.

Verdict for plaintiff for \$2,500.

WHITAKER *et al.* vs. EASTWICK *et al.*

Evidence of the quality of an article should not be admitted unless there is fraud or warranty by the seller.

Error to the District Court of Philadelphia. Opinion delivered by

MERCUR, J.—It is well settled as a general rule that the purchaser takes the risk of the quality of an article purchased unless there be fraud or warranty. In this case no fraud is alleged, and there was no express warranty. The action is assumpsit on an implied warranty of quality. There is an implied warranty of title and generally of the species in a sale, but not of quality. Hence, where the vendor in the bill of parcels described the article as blue paint, it was held to be an implied warranty that it should be blue paint: *Borrekins vs. Bevan et al.*, 3 Rawle, 23; *Fraley vs. Bispham*, 10 Barr, 320, was a case of the sale of tobacco by sample. In the bill of parcels it was stated to be "superior sweet-scented Kentucky leaf

[* *Original Edition*, p. 166.]

tobacco," yet the statement was held: First, to be no evidence from which a jury might infer a warranty that it was either superior or sweet-scented. Secondly, that the vendor was not liable in an action *ex contractu*, if it was Kentucky leaf tobacco, although of a very low quality, ill flavored, unfit for the market, and not sweet-scented. It was there said all gradations in quality are at the hazard of the buyer.

*The opinions of persons differ greatly as to the quality of goods sold. Purchasers do not generally rely solely upon the mere opinion of the vendor. They either act upon their own judgments or exact something more than the mere opinion of the person from whom they are buying. The law gives a remedy for breach of contract, but cannot undertake to give damages for mere expectations disappointed. Mere representation does not constitute a warranty. The relation between buyer and seller is not a confidential one. If the buyer, instead of exacting an explicit warranty, chooses to rely upon the bare opinion of one who knows no more about the matter than he does himself, he has himself only to blame for any loss he may thereby sustain: *McFarland vs. Newman*, 9 Watts, 55; *Wetherill vs. Neilson*, 8 Harris, 448. In the absence of an agreement by the vendor the purchaser takes at his own risk as to quality: *Eagan vs. Carr*, 10 Casey, 236.

The facts in this case show the defendants in error had previously frequently purchased in large quantities this kind of coal, but never of the chestnut size. They were, therefore, acquainted with its general character. They purchased this coal in question at fifteen cents less per ton than first-class coal was then selling. They now complain that it contained an unusually large percentage of slate and dirt. They got substantially the kind of coal for which they bargained. The evidence offered and received under objection was to its quality. It was error to admit it. The fact that it was represented as being well adapted to generating steam, and that by reason of its impure quality a larger quantity is required to generate a given amount of steam, are all insufficient to raise an implied assumption. The learned judge, therefore, erred in admitting the evidence.

Judgment reversed and a *venire facias de novo* awarded.

Court of Common Pleas of Philadelphia.

LAGROSSE vs. CURRAN.

Witnesses attending without subpoena, and not called to testify, are entitled to their costs where a subpoena had been taken out but they waived its service and where there was no allegation that their testimony was not needed.

Appeal from taxation of costs. Opinion delivered May 2, 1874, by

ALLISON, P. J.—This was action of replevin, in which double costs are claimed for fees of witnesses. Upon the trial of the cause the verdict was for the defendant, his bill of costs has been allowed by the prothonotary. The cause went in favor of the defendant upon

[*Original Edition, p. 167.]

the questions of law which were submitted to the court, upon the plaintiff closing his case, and none of the witnesses for whom costs are claimed were examined before the jury.

*The most important of the exceptions taken to those costs is that the attendance was voluntary, except as to one witness, who was duly subpoenaed.

There seems to be no reason to question the good faith of the defendant in procuring the attendance of his witnesses at the trial; he expected to be called on to make a defence to the case as presented by plaintiff. It was his duty, therefore, to come to the contest prepared with his witnesses ready to be called, and he might, with good reason, have anticipated that the cause would turn mainly upon a question of fact, as to a right of way along a court or alley which plaintiff alleged had been acquired by uninterrupted user of twenty-one years.

In *De Benneville vs. De Benneville*, 1 Binney, 46, it was held that a witness subpoenaed, though not examined, or if examined, though not subpoenaed, has a right to be paid, and that a party has a right to call as many witnesses as he thinks are necessary to make out his case. The court will protect against oppression by needless multiplication of witnesses. This cannot be successfully charged in this case. The witnesses were five in number, four of whom attended court for five days and one for four days.

This case differs from the rule laid down in *De Benneville vs. De Benneville* in the fact that there was here, as to four of the witnesses, no service of the subpoena. But it is also the fact that a subpoena was taken out, the names of the witnesses inserted in it, and that personal service was waived when about to be made, and that they attended court after they were informed that a subpoena had been taken out for them. Fraud, oppression or the slightest want of good faith has not been suggested. The fee bill gives compensation to witnesses for daily attendance upon court; it does not say anything about attendance in obedience to subpoena. If subpoenaed there is an additional allowance for cost of service. This is necessary to enable a party to compel attendance. The defendant, being liable to these witnesses for their cost, is entitled to the bill as it has been taxed.

Exceptions dismissed and taxation confirmed.

*Supreme Court of Pennsylvania.

FISHER vs. THE CITY OF PHILADELPHIA.

Possession is title, and the one having such title can only be ousted by him who shows one superior to it.

All the requirements of an act of assembly relative to the sale of lands, not being complied with by the bidder at a public sale, possession cannot be obtained by a person claiming title from the bidder.

Error to the Common Pleas of Schuylkill County. Opinion of the court delivered May 11, 1874, by

GORDON, J.—In *Shumway vs. Philips*, 10 Har. 151, the actual possession of land was held sufficient to protect the defendant in error

[*Original Edition, pp. 168 and 169.]

against all but the owner of the legal title. And in *Green vs. Kellum*, 11 Har. 254, it was ruled that one who enters and claims land as his own, improves it and maintains the possession, must be presumed to have entered by color of title and must be so treated until a superior right is shown against him.

Possession, then, is title, and the one having such title can only be ousted by him who shows one superior to it.

In the case under consideration the city is found in possession of the disputed premises. The plaintiff has shown no prior possession which the defendant disturbed, hence it cannot be treated as a mere intruder upon the plaintiff's right. It follows, therefore, that the plaintiff must show some title better than that arising from the defendant's possession or he is in no position to reverse the ruling of the court below.

In order to show such better title he endeavors to connect himself with that of John Nicholson, who held, through Robert Morris, from the commonwealth. For this purpose he exhibits certified copies of accounts of the commonwealth against John Nicholson, late controller general, filed December, 1796, showing balances which together amount to \$11,509.06, which by force of the act of 1785 became a lien on all his lands throughout the State; the warrant of the governor to Cadwalader Evans, Jr., Joseph Lyon and Joseph Hiester, commanding them to sell all the lands of Nicholson, set forth in the schedule thereto annexed, under and by virtue of the act of March 19, 1807, and also the report of the above named commissioners, dated July 18, 1807, setting forth *inter alia* the sale of thirty-three tracts, including that now in dispute, to Philip Meyer, the ancestor of the plaintiff's vendors, for the sum of \$2,049.50, secured by his own bond and that of John Meyer and George Miller. Whether this showing was sufficient to vest the Nicholson title to Philip Meyer is the question submitted for our determination.

*The act above recited (March 19, 1807) required the payment of the purchase money of the lands sold into the State treasury within four years from the date of purchase. Whether such payment should be deferred for any length of time "within that period," was referred to the discretion of the commissioners, who, if they did agree to defer such payments, were directed to secure them by the bonds of the purchasers with approved securities. Upon receipt of such bond they were to deliver to the purchaser a certificate of the property sold to him, setting forth the time and place of sale and the bonds received. These bonds were to be delivered into the hands of the State treasurer, and then, "on production of the certificate aforesaid and the treasurer's receipt for the consideration of the purchase," the secretary of the commonwealth was directed to make deeds to the purchasers for "such estate as the said John Nicholson had and held in the same at the time of the commencement of the liens of the commonwealth against the estate of the said John Nicholson." By consulting the act it will be seen that the powers of the commissioners were strictly limited. They had power to make the sales and receive the purchaser's bonds, but nothing more. They were not authorized to receive purchase

[* *Original Edition*, p. 170.]

money, make deeds or enforce their contracts of sale. In this, it will be seen, they had much less power than a sheriff or county treasurer. The purchaser by his bid made but one step towards title. If, following up this first step, he procured the certificate of the commissioners and paid the purchase money into the treasury, he became possessed of an equitable title which would secure to him the right of possession and upon which he might at any time demand his deed. So where, instead of paying the purchase money, the purchaser gave his bond, as provided by the act, he would have an executory contract upon which he might obtain a deed upon the payment thereof, but in such case he would not be entitled to possession before he obtained his deed or made such payment: *Baum vs. Dubois*, 7 Wr. 280.

Now, Philip Meyer seems to have accomplished but the one step in the way of title. He bid off the disputed tract at the commissioners' sales. But having regard only to the legal evidence in the case, he made no other step. It is true that the return of the commissioners sets forth that the bond of Philip Meyer was taken as security for the purchase money with that of John Meyer and George Miller. But, supposing this return to be evidence for all it sets forth, it does not inform us when, where or how it was executed or the time it had to run. Such evidence is too indefinite in itself to amount to anything in the way of proof of a lost bond or to prove the contents of such bond. But it is supplemented by the docket entries of the Common Pleas of Berks County, to April Term, 1812: William Findley, Esq., treasurer of the State of Pennsylvania, against George Miller, surviving obligor, in which it appears there was a summons in debt for \$4,099.00, that Evans appeared for the defendant, *craved oyer of the writing obligatory and imparled specially; further that on November 11, 1816, there was judgment for costs, but in whose favor is not stated, and on May 11, 1819, we find the final entry "not to be brought forward." We are now called upon to presume that because George Miller is mentioned in the return of the commissioners as one of the sureties of Philip Meyer and because the amount for which suit was brought was just double the amount of the purchase money mentioned in that return, therefore the suit was brought on the Philip Meyer bond. "An unprejudiced mind must concede that such a presumption would be a violent one." For admitting such entries to be evidence for any purpose, we cannot imagine how they could be evidence of anything more than appears upon their face, but a bond of Philip Meyer to the commonwealth for the purchase money of thirty-three tracts of land does not so appear, neither does it appear in the precept or writ. We cannot perceive that this supplement helps the matter in the least, and we must conclude that the alleged bond is not proved. But suppose we concede that it is proved, still we have no evidence of payment, and without this Philip Meyer had but a naked equity which sixty-seven years of time has so effectually buried among the things of the dead past that no amount of legal thaumaturgy can avail to resurrect it.

Our attention has been directed to the case of *Green vs. Watson*,

[*Original Edition, p. 171.]

10 Casey, 332, as in point for the plaintiff. Let us see if it is so. Judge Baldwin had bid off the land in dispute at the Nicholson sales, in July, 1807, transferred his purchase to George Bumford, in 1835, who, in the same year, obtained a deed from the commonwealth. Now as this deed, under the terms of the statute, was *prima facie* evidence that all the precedent steps were regular, and that the lien of the commonwealth had been extinguished by the payment of the purchase money, it was held sufficient to support a tax sale in 1823. The statement of this case shows it to be far from supporting that of the plaintiff now under consideration. It is urged that Justice Thompson, in the above cited case, said that the bond taken for the purchase money was a substitution for the lien of the State against Nicholson, and hence discharged it. Admit this to be correct, how does it help the plaintiff? If a bond were given by Judge Baldwin by the *prima facie* presumption arising from the deed, it was paid when due. But Fisher exhibits no deed either to himself or Philip Meyer. He has no certificate from the commissioners; he has proved no bond, and he has paid no purchase money. In no particular but the single one of a bid made at the Nicholson sales does this case resemble that of *Green vs. Watson*.

The judgment of the court below is affirmed.

*Court of Common Pleas, Luzerne County

JONES vs. THE DELAWARE AND HUDSON CANAL COMPANY.

1. Where judgment has been entered by a justice against a defendant who was in default, but who within twenty days entered bail for an appeal which he neglected to bring into court, *certiorari* will not avail to set aside an execution subsequently issued, even though the service of the summons be shown by the record to have been defective. Taking the appeal amounts to a recognition that the case was regularly before the justice and is a waiver of the defect which otherwise would have been fatal.
2. An agent may appear before a justice and take an appeal. The justice is the judge of the agent's authority, which, it must be presumed, was satisfactorily shown.

Opinion delivered March 19, 1874, by

HARDING, P. J.—The summons in this case issued March 25, 1872, returnable April 1 following. A sworn service is endorsed thereon as follows: "Served March 27, 1872, on the within named defendants by leaving a copy of the original summons at their office in Scranton."

The defendants were in default on the day of return. The justice, however, proceeded to hear the plaintiff's "proofs and allegations," and thereupon entered judgment in his favor for the amount of his claim. Within twenty days next ensuing the defendants, or some one for them, entered bail for an appeal. As our terms are arranged, this appeal need not have been filed until the third Monday of October, 1872, that being the first day of the term next succeeding the taking of the appeal. The defendants, however, for reasons which are not material in this connection, neglected to bring their appeal into court. Subsequently the plaintiff issued execution to

[*Original Edition, p. 172.]

collect his judgment. A few days afterwards the execution was arrested by a *certiorari* from this court.

The exception to the record of the justice is "that the service of the summons was insufficient in law, inasmuch as it does not show that any person whatever was served or notified of the existence of the summons." That there was no legal service of the summons cannot be disputed; but the defendants, by appearing and entering bail for an appeal within the statutory limitation, treated the case as being regularly before the justice and thus waived the defect which otherwise would have been fatal.

It is further objected that the record does not show that the party who took the appeal was an agent of the defendants or that he was authorized to act for them in this or any other particular. A party may appear before a justice as an agent, and the justice is the judge of the authority of the agent to represent the principal: *Barker vs. Chandler*, 5 H. 48.

The defendants here had the benefit of the delay produced by taking the appeal. As we have seen, they failed altogether to bring their appeal into court, and, six months afterwards, when the plaintiff took steps to enforce the collection of his judgment, they seek by *certiorari* to avail themselves of a defect which they had previously waived. Their writ comes too late; the proceedings are affirmed.

*Court of Common Pleas, Schuylkill County.

SWAIN vs. HALBERSTADT & WILSON.

When one puts his name on the back of negotiable paper before the payee has endorsed it, he assumes the legal relation of second endorser. To make him liable to any holder, the implied condition that the payee shall endorse before him, must be complied with to give him recourse against the payee.

The opening of a judgment regularly obtained is *ex gratia*. It will be refused where the defendant is guilty of laches, and especially where he tenders no affidavit explaining his laches, and showing a defence.

Rule to show cause why judgment should not be opened for matter appearing on the record. Opinion delivered May 11, 1874, by

PERSHING, P. J.—William Reese & Co. were the lessees of certain mining rights in the Valley Furnace lands, in Schuylkill county, for the owners of which F. B. Gowen, Esq., was the agent. In reply to a letter from Mr. Gowen, requesting the payment of rent, William Reese & Co., under date of November 20, 1871, addressed him a letter in which they state their inability to pay, and inquire whether their note at sixty days, with Halberstadt & Wilson as endorsers, will be taken for the amount. This proposition was accepted, and on December 6, 1871, Halberstadt & Wilson wrote to Mr. Gowen, enclosing in their letter the note on which the suit in this case was brought, "being," as they say, "for royalty on coal mined to 1st of November," and adding, "we have endorsed the above and enclosed it as soon as received."

The note is as follows:

[*Original Edition, p. 173.]

\$2452.67

SILVER CREEK, Dec. 6, 1871.

Sixty days after date we promise to pay to the order of Franklin B. Gowen, at the Miner's Trust Company of Pottsville, twenty-four hundred and fifty-two 67-100 dollars, without defalcation, value received.

WILLIAM REESE & Co.

This was endorsed, Halberstadt & Wilson, the other endorsements of the note all being subsequently made. The note was protested at maturity. Charles Swain, the present holder of the paper, and one of the owners of the lands of which Reese & Co. were lessees, brought this action against Halberstadt & Wilson, the defendants, and in March, 1872, obtained a judgment by default for want of an affidavit of defence. It is this judgment we are now asked to open.

On the argument it was contended that this was an irregular endorsement, and that the legal relation of the defendants to the note was that of second endorsers: that in the absence of the prior endorsement of the payee, the defendants are not legally answerable to the plaintiff. We concede the correctness of this position, and that it would have been a defence *if taken at the proper time. The irregular endorsement by the defendants of what is strictly commercial paper, is not such a promise in writing to pay the debt of William Reese & Co. as can be enforced against them. The act of 26th of April, 1855, sec. 1 (Frauds and Perjuries), interposes an effectual barrier to a recovery. This is settled by numerous cases, of which it is only necessary to refer to *Schafer vs. Bank*, 9 P. F. S. 144; *Murray vs. McKee*, 10 Ib. 35; *Hilbert vs. Finkbiner*, 18 Ib. 243. It must be remembered, however, that when once obtained, the opening of a judgment in a court of law is always *ex gratia*. In this case the record shows that the defendants were regularly served; that a copy of the note was filed with the declaration, and that everything required to be done was done before judgment was taken. Although more than two years have elapsed, the defendants do not tender an affidavit explaining their laches and showing any defence now, which did not exist in full force at the time suit was brought. C. J. Gibson, in *Cutlin vs. Robinson*, 2 Watts, 380, intimated plainly that a judgment by default, if opened at a succeeding term, ought to be on the ground of a defence arising subsequently, and only then when the rights of third parties will not be interfered with.

A court of equity will sometimes interfere to relieve a defendant from a prior adjudication in a court of law, but the aid of equity cannot be invoked in cases where the defendant has had a trial, or an opportunity for a trial in which he might have availed himself of his equities. He must not be guilty of laches in failing to set up his defence when he has the opportunity: *Wister vs. McMannes*, 4 P. F. S. 318. And it makes no difference that the instrument on which suit is brought, a copy of which has been filed, is not such as entitles the party to judgment. Whatever the defects in the cause of action filed, it is decisive that the defendant did not satisfy the statute by filing an affidavit of defence: *Phila. Sav. Inst. vs. Smith*, 10 Barr, 13.

The evidence shows that the credit in this instance was given to Halberstadt & Wilson, rather than to Wm. Reese & Co. Mr. Gowen states that the defendants were the agents of Reese & Co., for the sale of the coal of that firm; that Reese & Co. frequently remitted the check of Halberstadt & Wilson, and that Halberstadt & Wilson themselves often sent their check in payment of royalty due by Wm. Reese & Co. Mr. Gowen is explicit in his statement that it was solely on the strength of the endorsement of Halberstadt & Wilson that he accepted the note to the payment of which they now wish to make defence. Looking at all the circumstances connected with the transaction, we would only open this judgment upon the condition that the defence should be restricted to proof of payment. As it is not pretended that any part of the indebtedness has ever been paid, this would be doing a vain thing.

The rule is discharged.

***Supreme Court of Pennsylvania.**

BROWN vs. THOMAS & BLANDY.

The finding of an auditor, upon the evidence submitted before him, unless very plain mistake is shown, will be considered as conclusive, especially where his finding has been approved of by the court below.

Appeals from the decree of the Court of Common Pleas of Lehigh County. Opinion delivered May 11, 1874, by

SHARSWOOD, J.—As to the main question in these appeals, which is one of fact merely, according to the well settled principles upon which the court has always acted, we must consider the finding of the auditor upon all the evidence, after the second reference to him, to be conclusive, unless very plain mistake is shown. More particularly must that be so when his finding in that respect has been approved by the court below. We agree with the learned judge, that upon the reference back to the auditor the whole case was necessarily re-opened, and all parties before the auditor were bound to take notice of it. It would present a very strange anomaly if, as to some claimants upon a fund, a fact should be found one way, and in regard to other claimants on the same fund, there should be a contrary finding, and a distribution awarded to some and denied to others according to this double result, when it is manifest that in law and equity all stand upon the same platform. We hold then that the furnace in question was finished on the 1st of August, 1871, and the mortgage of the premises to Wm. F. Biddle was executed and recorded the next day. It is true that the weight of the evidence seems to be that the air and water connections were not then made, though the pipes were all laid ready for the connection. Yet on the other hand the testimony of Reichard, who laid the fire brick in the furnace in May, 1872, and it is not easy to see how he could be mistaken, is very positive and distinct: "The furnace had been in operation and was blown out before John F. Blandy came there; what was done after John F. Blandy came was repairing and building that other kiln; the furnace had been in operation before I

[* *Original Edition*, p. 175.]

came there and what I did was repairing; furnaces do sometimes chill when they are first started and require to be repaired." It is not a point in dispute that John F. Blandy did take charge of the work on the 1st of August, 1871, the date of the execution of the mortgage. Indeed it can hardly be disputed that the furnace was started and run a short time before that day. The only contention is that it was for an experiment with the roasting kiln, and not for the purpose of making iron. In either event we think the auditor and court below were justified in coming to the conclusion that the furnace was then finished according to its original plan, though that may have been defective, and repairs and alterations were afterwards made in order to remedy the defect.

*Thus far, upon the exceptions in the court below and the assignments of error in this court, nothing would remain but to affirm the decree and dismiss the appeals. But a point has been very ingeniously started here by the able counsel of the appellants, which requires to be noticed. It relates to the finding, both by the auditor and the court, of the existence of the lien of Charles F. Beckel. It is clear that though when the mortgage was executed Beckel had a claim to the extent of \$67.51, for work and materials then done, and which was left unpaid, yet if the furnace was finished August 1, 1871, and his claim was not filed until October, 1872, at the time of sheriff's sale upon the judgment of the claimant, Brown, he had no lien. The logical consequence follows, that the mortgage being then the first lien, the sale would be subject to the mortgage, and the mortgagor have no right to come on the fund. Hence it is argued the contention by the mortgagee that the furnace was finished August 1, 1871, is *felo de se*. It shows that he has no standing in court, and his objection to the award of the money, or any part of it, to the mechanics, ought to be disregarded as coming from an entire stranger. But it is to be remarked that no objection or exception in the court below appears to the claim of Beckel as a lien prior to August, 1871. The mortgagee indeed did except, but only to so much as was for work done, subsequently his appeal to this court has been withdrawn. There was good reason for this course. As we have seen, an objection to Beckel's claim by the mortgagee would have been fatal to his right to come on the fund. In like manner, an objection by the mechanics, if successful, would have been equally fatal to them, for if Beckel had no lien, on the ground that the furnace was finished August, 1871, so neither had any of them. What then is the consequence as far as our duty to the cause is concerned? Without exception and without assignment of error here, we are bound to regard the claim of Beckel as a valid subsisting lien, which was so at the time of the sheriff's sale. We are not called upon to take notice of the fact that it was not filed until October, 1872. No injustice is done by the decree. The furnace was, to all outward appearance, finished. The mortgagee advanced his money in good faith to pay off all existing mechanics' claims. The money was so applied except as to this small amount due to Beckel, which seems to have been overlooked by mistake. The work subsequently done was evidently in the nature of mere

[*Original Edition, p. 176.]

alterations and repairs, though undoubtedly if the furnace had not been before finished, they would, within the principle of *Norris' Appeal*, 6 Casey, 122, be entitled to be considered as a part of the original erection, and to relate back to the date of its commencement.

Decree affirmed, and appeals dismissed at the costs of the appellants.

*Supreme Court of Pennsylvania.

THE POWELTON COAL CO. vs. McSHANE.

It is permissible to give evidence of a verbal promise made by one of the parties, at the time of making of a written contract, where such promise was used as an inducement to obtain the execution thereof.

Error to District Court of Philadelphia. Opinion delivered May 18, 1874, by

GORDON, J.—It is certainly permissible to give evidence of a verbal promise made by one of the parties, at the time of the making of a written contract where such promise was used as an inducement to obtain the execution thereof: *Campbell vs. McClenachen*, 6 S. & R. 171. This rule is put upon the ground that the attempt afterwards to take advantage of the omission from the contract, of such promise, is a fraud upon the party who was induced to execute it upon such promise, and hence he will be permitted to show the truth of the matter: *Clark vs. Partridge*, 2 Barr, 13; *Renshaw vs. Gans*, 7 Barr, 117; *Dutton vs. Tilden*, 1 Har. 49.

Now, in the case in hand, McShane testified that the absolute condition upon which he signed the agreement was, that the company should furnish the coal by the first of October. He says, after speaking of their previous parol arrangement, "Mr. Berwin showed me the paper. I was in a great hurry. I picked it up. I glanced over it and said, Mr. Berwin, this is one sided; it don't mention that you will furnish the coal by the first of October. He said that is understood; we will not only furnish that, but expect to furnish five or ten thousand more by that time. I made answer, if that is understood, I will sign it." This piece of evidence showed a distinct and material condition by which McShane was induced to sign the contract. To say, then, that this contract might be enforced without regard to the express parol stipulation, under which it was signed, would be to disregard long and well-established legal principles, as well as the plainest demands of common honesty. The exceptions, therefore, to the charge and admissions of evidence are not sustained. The case was properly submitted, and though in fact the weight of the evidence may have been with the defendant, the resulting error lay with the jury, not with the court, and hence comes not within our power of correction.

These observations dispose of the main points in controversy. We may observe, however, with reference to the point made, that *indebitatus assumpsit* will not lie upon a special contract, except where there has been a full performance on the part of plaintiff; it

[*Original Edition, p. 177.]

is conceded that this proposition is correct. But the plaintiff did not only rely upon the special contract; that was set up by the defendant for the purpose of defeating the plaintiff's claim, and as the jury found that it was not operative by *reason of the defendant's fraud, we cannot see why the plaintiff's recovery under the *indebitatus* counts may not be sustained. So we cannot see that there was anything in the question raised by the defendants, as to the relation McShane's employé sustained to him. It was not alleged that the company had contracted with any one but the plaintiff, or that there had been a joint undertaking by him and some one else to transport the merchandise in question. That he had employed his own firm to assist him in the performance of his undertaking could, therefore, by no possibility affect his right to recover.

Judgment affirmed.

VANKIRK vs. THE PENNSYLVANIA RAILROAD CO.

An affidavit for the removal of a cause in which a corporation is a party, may be made by the agent or employé of the corporation.

Plaintiff bought a ticket over defendant's road, rode part of the distance, stopped over without permission, and tendered the same ticket for the remainder of the distance. The conductor took up the ticket, refused to return it, demanded fare, and, upon refusal to pay until the ticket was returned, ejected the plaintiff. *Held*, that the defendants were not entitled to the ticket and the fare too, and that the ejection of the plaintiff was unlawful.

Error to the Common Pleas of Snyder County. Opinion delivered May 11, 1874, by

MERCUR, J.—It is true the act of assembly providing for the removal of a cause, in which a corporation is a party, from the county in which it is brought to another, declares that the affidavit shall be made by the party. To give this a literal construction would defeat the manifest intent and spirit of the law. A corporation must necessarily act through its officers, agents, and attorneys. The force of this fact is felt by the plaintiff. He admits that the affidavit may be made by an officer of the corporation, but denies that it can be an agent or employé. The reason for this distinction is not very clear. It cannot be because the existence of the necessary facts may not be as well known to an agent as to an officer. In fact, an employé engaged upon the line of the road may know the sentiment of the people toward it better than an officer, whose time is occupied in the office, or who occasionally passes over the road. This affidavit was made by the superintendent of that division of the road where the controversy arose. It is not alleged that he made it without authority from the company, nor that his action therein has ever been repudiated by the defendant. The objection, then, must rest upon the ground of the legal inability of the defendant to authorize an agent or employé to make such an affidavit. In *Academy of Fine Arts vs. Power*, 2 Harris, 442, Chief-Justice Gibson well asked, "why should not the affidavit be as well made by a special deputy as by a president, secretary, or treasurer?" In that case the affidavit in behalf of the corporation was made by an agent to obtain a writ of error. It was held that the affidavit was well

[*Original Edition, p. 178.]

made by an agent though he was not expressly deputed for that purpose. We see no error in the first assignment.

The 3d, 4th, 6th and 7th assignments will be considered together. By the uncontradicted testimony it appears the plaintiff had purchased a *ticket from Northumberland to Williamsport. He had ridden upon it as far as Milton, being less than one-third of the distance. Several days thereafter he endeavored to ride upon it from Milton to Williamsport. The conductor refused to permit him to so ride, took up the ticket against the plaintiff's will, and put him off the train.

The court rejected the evidence offered by the plaintiff to prove that before he was put out of the cars he offered to pay his fare, if the conductor would return his ticket; that the conductor refused to return it, but insisted upon retaining it and also upon the plaintiff's paying his fare; to be followed by evidence that in claiming to ride upon the ticket he was acting in good faith, upon information given to him by the ticket agent of whom he had previously purchased the ticket.

It appears the plaintiff voluntarily left the train at Milton, without having communicated his intention to the conductor in charge, and without making any arrangement for a subsequent continuation of the trip. It is claimed that this was an abandonment of his right to demand a passage upon that ticket over the untravelled portion of his journey. This view is sustained under the general rules of the company, by the authority of *Dietrich vs. Pennsylvania R. R. Co.*, 21 P. F. Smith, 442, and kindred cases. His legal right had terminated. If he thereafter procured a ride upon it, it would be through favor only of the company. Waiving the question, then, whether the plaintiff, under the general instructions given to the conductor, had a right to ride upon the ticket, it does not follow that the conductor had any right to take it from him. The conductor assumed the ticket to be of no value to the plaintiff and persisted in retaining it. His determined persistency in retaining it was a most expressive declaration of its value to the defendant. The plaintiff believed it to be of value to him. The ticket agent had informed him that he was entitled to ride upon it. Thus the employes of the company differed. The plaintiff desired to test the question by legal proceedings. This ticket was to him important. It was evidence of value paid. It was evidence of a claim which he desired to establish by law. By denying the plaintiff's right to ride upon it, the conductor waived all right to take or retain it. The defendant had no more claim to this ticket than to any one of a half dozen other tickets, either cancelled or uncanceled, which the plaintiff may have had in his pocket. By leaving the train at Milton the plaintiff lost no other right than of riding upon the ticket thereafter. He did not forfeit the right to retain the ticket, which, according to the rules of the company, had been left in his hands. Many stations intervened between Milton and Williamsport. Before leaving the former place the defendant would not have been justified in taking up the ticket without giving the plaintiff a check or some evidence that he had paid his fare: *State*

[*Original Edition, p. 179.]

vs. *Thompson*, 20 N. H. 250. The right to take up this ticket must not be confounded with a case where a person has actually ridden on the ticket the whole distance for which it calls, nor where he has obtained it in fraud of the company. In either of these cases it may be taken up. In the *former the rules of the company and the implied contract in its purchase require it. In the latter the holder had no right to its possession. In this case the conductor, under his general orders, may not have been authorized to permit the plaintiff to ride on this ticket. There was, however, nothing in equity or good morals to prevent the defendant from permitting it to be done. There was no impropriety in the plaintiff's retaining the ticket.

The conductor having ignored the plaintiff's right to ride upon it, the most he was justified in doing was to require a payment of the fare. This the plaintiff proposed to show he offered to do, but the conductor required more. He required not only payment for the ride the plaintiff was then taking, but also the yielding up of a ticket on which he was not riding. The conductor had no such right. To concede to him the right to demand of a passenger anything additional to the accustomed fare, would be fraught with the most mischievous consequences. While a railroad company should be protected in the enforcement of all its reasonable rules, yet fully equal care must be taken to protect the rights of passengers from any encroachment. The plaintiff was entitled to ride upon the payment of his fare only. It was in clear violation of law to require more of him. He was justified in requiring the return of the ticket improperly withheld from him. The defendants being in fault themselves cannot enforce the right against the plaintiff, which they seek to invoke: 1 *Redfield on Railways*, 105, pl. 13; *Jennings vs. Great Western Railway Co.*, 12 Jur. N. S. 331.

The declarations of the ticket agent, made several days after his sale of the ticket, were not admissible to establish a contract between the parties; but we think they were admissible as evidence of the good faith of the plaintiff in his claim to ride upon it, and of his belief in its uncanceled condition. These facts, together with the additional one that the plaintiff was permitted to ride past several stations, are proper to be considered by the jury in determining whether he had just reason to suppose the conductor would permit him to ride through on the ticket, and was thereby induced to decline paying his fare until a late moment.

The fifth assignment is not very important. Inasmuch, however, as the witness had testified in regard to the ticket being punched; we think it was clearly pertinent to ask him "whether he knew what punching meant?" This may have been understood to ask whether he knew what act constituted punching, or what was its purpose.

We think the evidence covered by the eighth assignment bears upon the question of damages. The conductor having suffered the plaintiff to ride past several stations before ejecting him, and then having put him out, remote from any shelter, and in a severe storm, may be considered by the jury in deciding whether the con-

[* *Original Edition*, p. 180.]

ductor intentionally selected this inhospitable spot, or whether it happened to be the locality of the plaintiff's persistent refusal to pay. The learned judge, therefore, erred in taking the case from the jury, and the judgment must be reversed.

Judgment reversed and *venire facias de novo* awarded.

***District Court of Philadelphia.**

MARKLEY vs. WARTMAN *et ux.*

The husband is liable for necessities furnished to the wife for the support of herself and family, although she has been decreed a *feme sole* trader.

Opinion, June 13, 1874, by

MITCHELL, J.—It might be sufficient to say that the plea is defective in form, in not setting out that the wife was a *feme sole* trader at the time of contracting the debt, but we are clear that it is bad in substance, and therefore dispose of the case upon that ground.

At common law, the husband, and he alone, was liable for the support of the family, and this liability extended to all necessities furnished to the wife for that purpose. By the express words of the act of April 11, 1848, sec. 8, where debts are contracted for necessities for the support of the family of any married woman, the creditor may sue both husband and wife, and after exhausting the husband's estate, he may have execution of the wife's. The plaintiff by his declaration has brought himself clearly within this act.

We are unable to discover anything in the acts of 1718 and 1855, relative to *feme sole* traders, that shows any legislative intent to change, in their case, the common law rule so carefully preserved in the act of 1849. On the contrary, the act of 1718 expressly provides that where it is made to appear to the court in which any execution is returnable, that the wife, acting as a *feme sole* trader, has "laid out money for the necessary support and maintenance of herself and children, in such case execution shall be levied upon the estate of such husband, to the value so paid or laid out." And again, in section 3, if the husband remain absent so long that his wife and children "are like to become chargeable to the town," then the estate of such husband shall be liable to be taken in execution to satisfy any sums the wife or guardian shall necessarily expend for their support and maintenance.

The act of 1855 makes no change in the respective liabilities of husband and wife; it merely extends the operation of the act of 1718 to other cases than that of absence of the husband at sea, and refers for the privileges and liabilities of a *feme sole* trader to that act: 20 P. F. Smith, 498.

We think it is clear, therefore, from the rule of the common law, and the plain legislative intent of every act on the subject, that the primary liability for necessities for the support of the wife and family is upon the husband, whether the wife be entitled to the privileges of a *feme sole* trader or not.

These privileges are for her assistance and protection, not for his

[*Original Edition, p. 181.]

who had disregarded his natural and legal duty, and sought to escape his just burdens.

* The precise point involved in this case does not appear to have been decided by the Supreme Court, but it is necessarily involved in the decision of the converse proposition, that the wife is not primarily liable, made by this court in *Sheets vs. Cleaver*, 8 Phila. 3, affirmed by the Supreme Court in 20 Smith, 496.

Judgment for plaintiff on the demurrer.

Supreme Court of Pennsylvania.

JERMYN vs. MOFFITT.

An assignment of part of a debt to arise for wages not yet earned against any person by whom the assignor might be employed, although the employer have notice of the assignment, is insufficient, without acceptance, to make a valid transfer of the debt against the employer.

Error to the Mayor's Court of the City of Carbondale. Opinion delivered May 11, 1874, by

MERCUR, J.—The first assignment of error is to the answer of the court on an abstract proposition submitted by the plaintiff in error. In view of the broad and general terms in which the point was presented, we see no error in the answer. In some cases a valid assignment may be made of moneys thereafter to be made, or of grain thereafter to be grown: *Grantham vs. Hawley*, Hobart, 132; *Peters vs. Tatem*, 12 Mee. & W. 109; or of the future earnings of a railroad: *Bittenbender vs. S. & E. R. R. Co.*, 4 Wright, 260. If counsel desire an answer applicable to the evidence in the case being tried, they should so indicate it in their point submitted.

The second assignment involves the sufficiency of the transfer to give a right of action to Moffitt against Jermyrn. Leslie assigned to Moffitt "five dollars a month of my earnings in the employment of the Delaware and Hudson Canal Company, or with whomsoever I may be employed, until the amount due the said Moffitt is paid." Jermyrn's name is not mentioned in the assignment. It does not appear that, at the date thereof, Leslie was in his employ, or that any business relations existed between them.

The court charged substantially, if Moffitt did, within a few months after the assignment was made, hand a copy of it to Jermyrn, and Leslie continued in his employment thereafter, then Jermyrn became responsible to Moffitt at the rate of five dollars a month out of wages so earned by Leslie, until the amount due from the latter to Moffitt was paid. The answer wholly excludes from the jury all question in regard to any acceptance by Jermyrn, and any express or implied agreement of his to pay. The court assumes, as a matter of law, that if Moffitt merely handed a copy of the assignment to Jermyrn, and Leslie thereafter continued in his employ, it gave Moffitt a right of action against Jermyrn. It is true where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands. Where, however, the assignment is

[*Original Edition, p. 182.]

of a part only * of the fund the law seems to be otherwise. Thus it was said by Mr. Justice Story, in giving the opinion of the court in *Manderville vs. Welch*, 5 Whea. 277, "when the order is drawn on a general or a particular fund for a part only, it does not amount to an assignment of that part, or give a lien against the drawee, unless he consent to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties as a part of their contract." The reasons which he gives are, that a creditor should not be permitted to split up a single cause of action into many actions without the assent of his debtor, thereby subjecting the latter to embarrassments and responsibilities not contemplated in his original contract. It was held in *Gibson vs. Clark*, 20 Pick. 15, that the assignment of part of a debt will not bind the debtor, either in equity or at law, nor deprive him of the right to pay the whole to the assignor, after notice that a part has been transferred to the assignee. All the decisions relating to this question of assignment are not in entire harmony. We shall not now attempt to reconcile them. We, however, are clearly of the opinion that an assignment like the present one, which professes to transfer a debt to arise for wages not yet earned, against any person by whom the assignor may thereafter be employed, although followed by a subsequent notice of the assignment to such an employer, is insufficient, without acceptance, to make a valid transfer of the debt against the employer. The second assignment of error is sustained.

Judgment reversed and a *venire facias de novo* awarded.

GAVIT vs. HALL.

In a proceeding by a landlord to recover possession, the affidavit to the complaint was signed "A per B, Agent." Held, to be the affidavit of B, and sufficient proof. The sheriff's return of jurors summoned did not name them, but the aldermen's record did. Held, the variance immaterial in the absence of objection or challenge at the time, as they must be presumed to be the same persons.

Certiorari to the Common Pleas of Philadelphia.

This was an action brought under the act of assembly of March 21, 1772, to recover possession of premises, No. 1419 Race street, in the city of Philadelphia. The proceedings before Aldermen Beitler and Smith, and jury of inquest, were certioraried to the Court of Common Pleas. A number of exceptions were filed. The only ones pressed at the argument, however, were:

1. "The complaint was not made on due proof. It is neither sworn to by Gavit nor by Blair. The affidavit to the complaint is signed 'Nelson Gavit, per A. F. Blair, Agent.' This is the affidavit of neither of them, nor could either of them be indicted for perjury on it.

2. "There is a variance between the sheriff's return and the record of the aldermen. The sheriff's return states that he summoned twelve freeholders, but does not name them. The aldermen's record sets forth 'that the sheriff had returned that by virtue

[*Original Edition, p. 183.]

of the warrant to him directed * he had summoned twelve substantial freeholders, to wit,' (naming them). It is material that the record show that the sheriff had selected the jurors, and his return is the only evidence of that. How can the court ascertain from this record that these were the jurors selected by the sheriff?"

The Court of Common Pleas sustained the exceptions generally and reversed the judgment of the justices. No opinion was filed. Nelson Gavit, the complainant, sued out a writ of certiorari.

Opinion delivered May 11, 1874, by

MERCUR, J.—This was a proceeding before two aldermen to dispossess a tenant after the expiration of her term. The inquest found all the facts made necessary by the act of assembly to require the possession of the demised premises to be given to the plaintiff. The record made by the aldermen is in accordance with the finding, and correct in form. Upon certiorari and exceptions filed, the Common Pleas reversed the judgment, but filed no opinion.

On the argument, two grounds were urged against the judgment of the aldermen, to wit: first, the insufficiency of the affidavit to the complaint; secondly, the insufficiency of the sheriff's return relating to summoning the jurors.

1. No objection is made that the complaint is not full and explicit, nor that it does not contain every fact required to be therein set forth. It is claimed, however, that it is not shown with sufficient certainty by whom the affidavit was made. There is no room to doubt that the affidavit was made by the person who signed the complaint. It is clearly manifest that it was signed by Blair, as agent for Gavit. I see not how that fact could have been averred in more unequivocal language. The conclusion necessarily follows that Blair made the required proof.

The two aldermen adjudged the proof sufficient, and issued their warrant to the sheriff. We see no error in this: *Cunningham vs. Gardiner*, 4 Watts & Serg. 120.

2. The sheriff made return to the writ, *inter alia*, that he had summoned twelve substantial freeholders of his bailiwick. It is true he omitted to state their names in his written return, but the inquisition taken very soon thereafter does give the name of each juror. No objection was then or thereafter made, that they were not the identical freeholders summoned by the sheriff. The presumption is that they were. If the defendant was not satisfied of that fact, she should then have challenged the array, or have made some objection before the jury was sworn. By going to trial without objection, it was afterwards too late to interpose a hypothetical assumption to set aside the finding of the jury and aldermen: *McDermott vs. Hoffman*, 20 P. F. Smith, 31. The maxim, "*omnia præsumuntur rite esse acta*," applies with full force to these official acts.

We discover no fatal error in the judgment of the aldermen, and the judgment of the Common Pleas must be reversed.

Judgment reversed and judgment in favor of the plaintiff.

Supreme Court of Pennsylvania.*SATTERLEE vs. MELICK.**

Under counts for goods sold and delivered, work and labor done, the common money counts, and on an account stated there can be no recovery against a bailee for negligence in not returning the full amount of goods bailed.

Error to the Common Pleas of Clinton County. Opinion delivered May 11, 1874, by

SHARSWOOD, J.—This was an action of assumpsit. The declaration contained counts for goods sold and delivered, work and labor done, the common money counts, and on an account stated. The plaintiff's case was that he had sent a certain number of logs to the defendant, who owned and operated a saw mill, to be sawed. He undertook to show that he received only a part of the lumber from the defendant after it had been sawed, leaving some thirty thousand feet and more unaccounted for. The learned judge below, in his charge to the jury, treated the case as though it had been an action against a bailee for negligence, either *ex contractu* or *ex delicto*. He instructed the jury that such a bailee as the defendant was bound to exercise the same care over the property entrusted to him as a prudent man ordinarily takes of his own property similarly situated; that if, for want of such care, the plaintiff's lumber, or any portion of it, was lost, the defendant would be liable for it, and that no other proof of negligence or conversion had been given than that which grows out of the quantity of lumber sawed and the quantity delivered; this, however, made out a *prima facie* case and put the defendant on proof of the care exercised. This might have been a true statement of the principles of law had the declaration warranted it. If it had been an action on the case for negligence, or had there been a count upon a contract to keep as bailee, it might have been all well. But what notice had the defendants to come prepared to meet the question of negligence by which the lumber was lost? On an amendment of the narr. below they would have been entitled to a continuance. The learned judge was evidently not very clear in his opinion, for in his charge he said: "We are not without doubt as to whether under a count for goods sold and delivered, or money had and received, a recovery ought to be permitted on the evidence in this case, but we instruct you that the narr. is sufficient, and that the case is for you upon the evidence." One of the objections to the practice of trying cases on the general issue is that the plaintiff cannot discover in general before he comes to trial what defences he will have to encounter. It would be still worse if the defendant were obliged to go to trial without knowing, at least, the general character of the claim upon him. It is evidently true that in many cases the owner of goods wrongfully taken or detained by another may waive the tort and recover on a count for money had and *received in assumpsit. But then there must either be some evidence that goods have been actually converted into money by the wrong-doer or the circumstances must be such as

[* *Original Edition*, pp. 185 and 186.]

to raise a presumption that he has done so. The leading case on this subject is *Longchamp vs. Kelly*, Dougl. 137. That was the instance of a masquerade ticket which the defendant received to sell for the plaintiff. He neither accounted for the price nor returned the ticket. Lord Mansfield and the Court of King's Bench held that it was a fair presumption that he had sold it and the plaintiff could recover under the count for money had and received. To the same point may be cited our own cases of *Willet vs. Willet*, 3 Watts, 277; *Gray vs. Griffith*, 10 Id. 431; *McCullough vs. McCullough*, 2 Harris, 295. The defendant in error relies upon the decision in *Deysher vs. Triebel*, 14 P. F. Smith, 383, to support the contention that a recovery might be had upon the count for goods sold and delivered. But that opinion does not sustain him. There must be some fraud, unfair dealing or other circumstances from which an implication may arise under such a count, as if a coal merchant, by mistake of his driver, empties a ton at my door, and I take it without inquiry or objection and consume it, knowing that it must have been sent by mistake, it may be that a recovery could be had against me in assumpsit under a count for goods sold and delivered upon an implied promise to pay the market price. It is evident that conversion or consumption was essential; a mere detention, or a loss even by negligence, would not have been enough to charge him in this form of action. There must be something from which to presume that he assumed the ownership as vendee.

Judgment reversed and *venue facias de novo* awarded.

WATSON vs. RYND *et al.*

Treble damages may be recovered for cutting timber on the land of another. It is not absolutely necessary to prove that the defendant knew that the timber was not on his land.

Error to Common Pleas of Warren County. Opinion delivered May 18, 1874, by

GORDON, J.—If anything other than the act of 1824 itself were wanting to show that the court below erred in refusing to treble the damages, found by the jury in this case, it may be found in the case of *O'Reilly et al. vs. Shadel*, 9 Ca. 489. In that case it was expressly decided that the want of knowledge on the part of the trespasser did not relieve him from the penalty imposed by the third section of the act. And the intention of the legislature is therein pointed out by calling attention to the significant fact that the words "knowing the same to be growing or standing upon the lands of another person," used in the second section, which makes the cutting of such timber a criminal offence, are omitted in the third section which provides for the civil remedy alone.

The want of the owner's consent is that which makes this part of the act effective. The significance of this omission is further added to by the wording of the first section of the act of 1840, wherein the penalties of the *third section of the act of 1824 are extended to "any person or persons who shall purchase or receive

[*Original Edition, p. 137.]

any timber, tree or trees, knowing the same to have been cut or removed from the lands of another person without the consent of the owner or owners thereof." Here we see, as it would be obviously unjust to impose a penalty upon an innocent purchaser, the act is operative only where there is knowledge of the guilty cutting or removal of the timber. We may, therefore, conclude with certainty that these words were intentionally omitted in the third section of the act of 1824.

The design of the statute was to prevent trespassing upon timber lands, and it has proved itself to be very valuable for that purpose. We do not, therefore, feel ourselves constrained to impair its provisions by any novel construction and thus unsettle the uniform convictions of the bench and bar with reference to them.

The timber lands of this State have heretofore been regarded as a permanent and secure investment, owing to their steady advancement in value. Hence, the mere price of stumpage has not, as a rule, been regarded as a full compensation to the owner for the loss of his timber. Indeed three times such price will often not more than compensate him for his loss and the vexation and expense of a law suit. Beside this, it is in this country generally supposed that persons have a right to enjoy their honest acquisitions without molestation, and if any one chooses to trespass upon them, he must take the consequences.

In this case it is said that the trespass of Rynd was unintentional; that some one showed him the line run by Ludlow in 1850, as the true line between the two tracts, and being thus misled he cut to that line. But we do not understand that it was the plaintiff that showed him this line, or that he ever consulted the plaintiff about it. He certainly knew that the line to which he cut was not the warrant line; it was far too young for that. It was his duty, therefore, to ascertain from the owner of the adjacent tract, whether or not, that was the line to which he claimed, and if not, to delay his cutting until the matter could have been properly settled. It seems to us that this is what one who was very anxious about the rights of his neighbor would have done.

We may here observe that the cases cited by the defendant's counsel, of *Herdie vs. Young*, 5 P. F. S. 176, and *Craig vs. Kline*, 15 Id. 400, have no bearing upon this case, inasmuch as they involve the common law rule of assessment of damages, and not that arising under the statute. It follows from what has been said, that the court erred in discharging the plaintiff's rule. The jury having found single damages, the court should have trebled them.

And now, May 18, 1874, the judgment of the Court of Common Pleas of Warren County is reversed, and judgment is now entered upon the verdict in the sum of six hundred and seventy-five dollars, that being treble the amount of the single damages found by the jury, with interest thereon from the 14th day of September, 1872. The record is remitted to said court for execution.

**GOOD vs. GRANT et al.*

When money is paid into court by a garnishee in a contest between the attaching creditor and a judgment creditor of the garnishee, the issue should be formed between them.

The statutory period of six months bars a recovery by attachment of excessive interest paid the garnishee by the defendant in the attachment.

Error to the Common Pleas of Clinton County. Opinion delivered May 11, 1874, by

MERCUR, J.—This case seems to have been tried in a very irregular manner. The defendants in error issued an attachment execution against the plaintiff in error as garnishee of Peter Dickinson. At this time Samuel Dickinson held several judgments against Good. He admitted his indebtedness upon them. The court say in their charge, "when the money became due the court directed the garnishee to pay the money into court, and this attachment execution is now being tried for the purpose of determining whether any portion of the money paid into court is the property of said Peter Dickinson." The contest then really was between the defendants in error as attaching creditors of Peter Dickinson as one party, and Samuel Dickinson as the other party. The issue should have been formed and tried between them. By paying the money into court, Good admitted his liability to pay the judgment; although it is said the "court directed" him so to pay it in, we will not assume this direction to have been made without his request. The garnishee should then have been relieved from further costs. The contest should have been carried on in form, as it was in fact, between the two parties claiming the fund. Being then in fact a question between the two claimants of the fund, it raised and directly involved the question whether Samuel Dickinson was indebted to Peter Dickinson. The right of the defendants in error to recover depended upon their establishing that Samuel was so indebted. This necessarily led to an inquiry into the business transactions between Peter and Samuel, to ascertain whether, upon the whole, Samuel was indebted to Peter. As there is no proof of any intentional fraud between Peter and Samuel, the same evidence should have been received as in a suit brought by Peter against Samuel. The attaching creditor occupied no higher ground than Peter would have done. The learned judge appears to have thought the attaching creditor possessed peculiar equities arising from the fact that his judgment was entered while there was a right of redemption in Peter; and that this precluded an inquiry into other distinct transactions. We are not able to see that any such exclusive equities spring from the lien of the judgment. If the fund in court had been raised by a sheriff's sale of the real estate, then the question of the lien of the judgment would have been important. In this proceeding by attachment, the right of the defendants in error to recover, does not rest upon the lien, but simply upon the indebtedness. If the judgment had never been a lien on this land,

or if the lien had been lost by lapse of time, the rights of the attaching creditor upon it would have been the same.

To pay interest in excess of the legal rate is not necessarily fraudulent as to creditors. To enable the party who has paid it to recover back, the statute requires his action to be brought within six months after it was paid. In an actual good faith transaction between the parties, the attaching creditor has no greater rights than the party paying such excess. Therefore, if the payment of interest was actually so made in July, 1870, this attachment which issued in February, 1872, was too late to recover it back. The court, therefore, erred in instructing the jury to find the excess of interest in favor of the plaintiff below. The errors assigned are sustained.

Judgment reversed and a *venire facias de novo* awarded.

***Supreme Court of Pennsylvania.**

CLEDENON vs. PANCOAST.

It was error in the court below, in not submitting to the jury evidence offered to show the terms of the acceptance of an offer to sell real estate.

Error to the District Court of Philadelphia. Opinion delivered May 11, 1874, by

MERCUR, J.—This suit was brought to recover commissions claimed to have been earned by the plaintiff as a real estate broker. When his evidence closed the court ordered a non-suit. Was this error?

The plaintiff averred that he was authorized to procure and did procure a person to bargain and buy of and from the defendant the land in question, for the price or sum of \$17,000.

The evidence shows that subsequently the plaintiff had some negotiation with a Mr. Howell in regard to purchasing it, and they had fixed upon a time to go and examine the property. During an interview soon after between the parties, the plaintiff informed the defendant that he thought he had procured a purchaser and that he had given him the whole of that week to decide. To this defendant replied, "if your man will take it by Saturday, all right, he can have it; after this week I will not be bound." The plaintiff communicated this to Howell. The latter examined the property, and on Saturday morning informed the plaintiff he would take the property. He, however, requested the plaintiff to ask the defendant whether it would be convenient to take some mortgages on account of the purchase-money. Thereupon the same morning the plaintiff told the defendant that this man would take the property. That it was Mr. Howell, and that he would like to give him some mortgages in part payment of the purchase-money. The defendant replied, "that lets me out, I won't sell." The plaintiff said, "no, he only said he would like to give you the mortgages, if it suited you, but he will take the property anyhow, and will pay cash if you require it." The defendant persisted in his refusal to close the sale, and Howell insisted on the purchase, declaring his

[*Original Edition, p. 189.]

readiness to pay the cash as soon as the papers could be prepared.

We understand the defence to rest wholly upon the fact, that when the acceptance was communicated to the defendant, it was accompanied with a request that he take mortgages for a part of the purchase-money. It would seem by the defendant's answer, that at first he might have understood this request to be one of the conditions of the purchase. If so it appears this impression was immediately corrected by the plaintiff. This is the turning point in the case. Howell accepted the offer as to price, and upon the day designated. Did he or not change the manner of payment? The offer to sell was for cash. Was the acceptance *conditional upon the defendant's taking some mortgages, or was it unconditional? We are clearly of the opinion that the evidence was sufficient to have been submitted to the jury to find whether it was not unconditional. If the jury should so find, the plaintiff had clearly sustained his averment. He had procured a person to bargain and buy the property of the defendant at the price named. We think, therefore, the learned judge erred in not submitting the case to the jury.

Judgment reversed, and a *procedendo* awarded.

PENNSYLVANIA RAILROAD CO. *vs.* DALE.

The question of damages for personal injuries, resulting from the negligence of railroad employes, is for the jury to determine.

Error to the Court of Common Pleas of Warren County. Opinion delivered May 11, 1874, by

GORDON, J.—If there be anything in this case from which a doubt as to the rectitude of the ruling of the court below might be raised, it would be from the admission of evidence under the defendant's ninth exception, and the answer to its fourth and fifth points. The offer was "to show, that at the time of the accident, one part of the business of the plaintiff was dealing in lands, buying and selling the same; that he had a quantity of land then on hand; and to show the value of the business at the time of the accident, and the profits arising therefrom." The answer to the points was as follows: "If the plaintiff at the time of the injury, was engaged in a legitimate business, from which pecuniary profits had arisen and future profits might be reasonably expected, which business was interrupted or suspended in consequence of disabilities, physical or mental, inflicted by the negligence of the defendant, the loss of such anticipated profits is properly the subject of compensation in damages."

Without overruling our own decisions, we cannot say that this admission and answer are wrong. This very point came up in the case of the *Railroad Co. vs. Coyle*, 5 P. F. S. 396, wherein it was held, that the plaintiff, who was a peddler, might prove the annual amount of his sales, and the profit he made thereon, as tending to show the amount he might have earned had he been

able to attend to his business. We apprehend that the profits arising from a legitimate land business are not less certain than those arising from the business of peddling, nor more difficult to estimate.

It is true, that merely speculative profits are not to be considered, and against the consideration of such profits, the court carefully guards the jury by saying, "if, however, the business was uncertain and speculative and not attended with any reasonable certainty of profits, then it would not have a pecuniary value to be estimated in this action."

The damages in cases like this are to be arrived at by considering the reduction which the accident has wrought upon one's earning powers, whether mental or physical, or both combined, and in order to do this *properly, reference must always be had to the business in which such an one is engaged at the time of the accident. No better rule can be laid down than that adopted by Justice Sharwood, in the case of *The Railroad Co. vs. Buller*, in which he says: "The proper measure of damages is the pecuniary loss suffered by the parties entitled to the sum to be recovered, and that loss is what the deceased would probably have earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability and disposition to labor, and his habits of living and expenditures." This rule, though immediately applicable to cases brought for damages resulting from the loss of the life of a husband or parent, is nevertheless applicable, *mutatis mutandis*, not only to the case in hand but to all similar cases.

Human business is as varied as human wants and human ideas. Each one adopts that which suits him best, or from which he can derive the largest profits, and when, by another's negligence, he is deprived of the power of properly conducting such business, the question of what damages he shall have by way of compensation is wholly for the jury.

Judgment affirmed.

GLENDON IRON CO. *vs.* UHLER *et al.*

1. The name of a town or incorporated borough cannot be exclusively appropriated by one person as a trade mark, where the same kind of goods are manufactured by others in the same place.
2. The fact that the name was adopted as a trade mark before the town was incorporated, makes no difference.

In equity. Appeal from the Common Pleas of Northampton County. Opinion delivered May 11, 1874, by

MERCUR, J.—Glendon is the name of the town in which the business of each party is located and carried on. It is an incorporated borough. Being, then, the name of an incorporated town, the main question is whether the appellant lawfully has the exclusive right to use it as a trade mark. It is conceded, as a general rule that the name of a town or city cannot be so appropriated as the ex-

[*Original Edition, p. 191.]

clusive property of any one. This view is well sustained by authority. High on Injunction, sect. 673; Bispham's Eq. 411; *Wolf vs. Goulard*, 18 Howard's Prac. Rep. 64; *Brooklyn White Lead Co. vs. Massey*, 25 Barb. 416; *Newman vs. Alvord*, 49 Barb. 588; *Candel vs. Deere*, *Supreme Court of Illinois*, 10 Am. Law Reg., 3 N. S. 694; *Del. & Hud. Canal Co. vs. Clark*, 18 Wallace, 311.

It is contended by the appellant that this case is taken out of the general rule inasmuch as the trade mark was adopted prior to the incorporation of the borough, and before there was any town in that place. No authority is cited which supports this distinction. The case of *Wotherspoon vs. Gurrie*, Lord's Journals, April 18, 1872, is clearly distinguishable. It is known as the Glenfield Starch Case. It is true the injunction was there granted, but the complainant and respondent were not both engaged in carrying on the same business in the same town or city. There was no town nor city there. The Lord Chancellor says: "Glenfield is not a town . . . it is not a parish, it is not a hamlet, it is not a district of any special character, but it was an estate of that name upon which some people seem to have erected some houses or manufactories, and upon which now some sixty people are living." It will not do to apply to an incorporated borough in this State, the same rule that may be applicable to an estate in England. Such a borough is essentially of a public nature, the estate is of a more private character. The name which an individual may give to his estate is unlike that which legislative sanction has given to a municipal corporation. The right of the public in each is radically different. The appellees did not falsely represent the place of their business location. Their pig iron was actually manufactured within the borough of Glendon.

It is said in *Canal Co. vs. Clark*, supra, "True it may be that the use by a second producer in describing truthfully his products by a name or combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken but they are not deceived by false representations, and equity will not enjoin against telling the truth." The appellees put upon their pigs the initials of their firm and the name of their town. That name was Glendon to the whole world. It cannot be that the previous appropriation by the appellant of the word which now is the name of the town, prevents any other manufacturer of pig iron, within its limits, from using the same word. If it be so now, it may continue through all coming time. The boundaries of the town may be enlarged; the borough may grow into a city; the manufactories of pig iron may be multiplied, yet the word most expressive to indicate their locations must be denied to all save one. So far as the authorities go to restrain a manufacturer from the adoption of a truthful trade mark, we will endeavor to enforce them. When asked to go further

[* Original Edition, p. 192.]

we must decline. If the effect of the incorporation of the appellants' district of country into a town by the name of "Glendon" has been to deprive them of some of their former rights, they must submit to the consequences. As well might they complain of the increased taxation which the municipal corporation has probably imposed upon their property. By the creation of this new municipality they assumed new relative rights. They relinquished some which they previously possessed. The rights thereby given to the public became common to all citizens dwelling therein. We see nothing in the facts of this case, even as found by the master, to take it out of the general rule, which denies to one the exclusive use, as a trade mark, of the name of the town in which the same kind of goods are manufactured by others. The commission of a lawful act does not become actionable although it may proceed from a malicious motive: *Jenkins vs. Fowler*, 12 Harris, 308; *Idem*, 4 Casey, 176. This view is decisive of the case. We will, however, add that an examination of the evidence has, in one respect, led us to a different conclusion than the one arrived at by the master. We are unable to discover satisfactory proof that the appellees adopted their trade mark with the design of imitating the one used by the appellants. The learned judge was entirely correct in dismissing the bill.

Decree affirmed and appeal dismissed at the cost of the appellant.

*Supreme Court of Pennsylvania.

JOSEPH BROWN vs. COMMONWEALTH OF PENNA.

1. The court below refused to permit the grand jurors to be polled on their *voire dire* before the submission of the bill of indictment. *Held*, not to be error.
2. Under an order for a *tales de circumstantibus*, the sheriff may summon the talesmen from either the bystanders or the body of the county, or both. The 41st sec. of the Crim. Procedure act of March 31, 1860, construed.
3. When two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gesta*, the death of the one and surrounding circumstances may be given in evidence upon the trial of the prisoner for the murder of the other, not as an independent crime, but as tending to show that the motive was one and the same which led to the murder of both at the same time: *Shaffner vs. Comth.*, distinguished.
4. On a question of the admissibility of the confessions of a prisoner, which had in the first instance been admitted by the court, it is not error to submit it to the jury on the evidence to say whether any improper influence was used, and, in charging, if there was any, that they should disregard the confession.

Error to the Criminal Court of Schuylkill County. Opinion delivered July 2, 1874, by

AGNEW, C. J.—On the night of the 25th of February, 1872, Daniel M. Kraemer, a farmer of reputed wealth, aged about sixty years, and his wife were murdered on his farm in Washington township, Schuylkill county. She was found on the next morning lying across her bed insensible and partially undressed, but afterwards became conscious and able to state some of the circumstances of that night, and died on the 4th of March following. Her son, living away from home, who first found her, ran to give the alarm,

[*Original Edition, p. 193.]

and on his way discovered the dead body of his father lying at a distance from the house of about three hundred yards. Near him was found a heavy oak club covered with blood and hair. The wounds on the head of both husband and wife were such as this weapon would probably make, and were of a fatal character. The chest, bureau, and desk in the house had been broken open, and evidence that the perpetrator of the murders had been in pursuit of plunder. The only inmate of the house beside Mr. and Mrs. Kraemer, was her mother, a lady so old, deaf, blind and helpless that she could furnish no information. All the circumstances evidenced that the murders and the search for money, were contemporaneous and part of the transaction.

The prisoner has been twice tried and convicted. The first conviction for the murder of Daniel Kraemer, was reversed for errors more technical than substantial. The second conviction was for the murder of Mrs. Annetta Kraemer, and this is the record before us. Under these circumstances, before reversing a second time, a court should feel satisfied a substantial error has been committed. Of the forty-six assignments of error, only a few present questions of substance. Many are unsubstantial, others are technical, and some are unsupported by the requisite evidence. We shall notice those only we think deserving, and shall group many of them together.

The first subject of remark will be the objections to the jurors. In *Dyott vs. Comth.*, 5 Wharton, 67, it was held that after a prisoner stands mute, a plea of not guilty is entered for him and he participates in the trial and is convicted, the case falls within the provisions of the act of 21st February, 1814, enacting that a trial on the merits, or pleading guilty on the general issue, shall be a waiver of all errors and defects or appertaining to the *precept venire*, drawing, summoning and returning of the jurors. This decision resulted from the language of the act of 23d September, 1791, relating to prisoners standing mute or challenging peremptorily more than the allowable number of jurors, that the trial shall proceed in the same manner as if the prisoner had pleaded not guilty, and put himself for trial on the country. We do not think this decision is applicable to a case where the prisoner makes his objections at first to the panel of jurors, and on their being overruled, takes a proper bill of exceptions; but the decision is strongly illustrative of the unwillingness of courts to sustain objections to the jury, grand or petit, after a full and fair trial on the merits. It is therefore sufficient to say as to the first and eighth assignments of error to the refusal of the court to quash the array of the grand and the petit jurors, that the objections of the prisoner were squarely traversed by the commonwealth by plea, while the bill of exceptions contains no evidence of their truth. We must presume the court had sufficient ground to refuse the challenge.

The 2d, 3d, 4th, and 5th errors raise the single question, whether, upon a challenge to the polls of grand jurors, the prisoner will be permitted to examine them on their *voire dire* to support his objections. The court was willing to receive other proof. As to petit

[*Original Edition, p. 194.]

jurors, who try the prisoner, and therefore should be above all exception, the rule is to permit them to be examined on their *voir dire* to prove objections to their competency. But the reason does not hold good as to the grand jurors, who do not try the prisoner, but merely inquire on the evidence of the commonwealth alone, whether there is sufficient probable ground of the commission of the offence charged in the indictment laid before them. It would be impossible to conduct the business of the Courts of Quarter Sessions and Oyer and Terminer, if every person indicted for an offence could claim the right of polling the grand jurors on their *voir dire* in order to purge the panel. Indictments for murder may be found in the Quarter Sessions and certified into the Oyer and Terminer. A due regard for public policy, as well as for the interests of justice and the nature of the inquiry forbids that grand jurors should be polled and tried in this manner. If the prisoner have evidence to purge the panel, let him produce it. Sixth assignment.—That a bill of indictment may be sent up to the grand jury by *the attorney-general, or was, by the district-attorney, with the sanction of the court, is shown in *McCullough vs. Comth.*, 17 P. F. Smith, 30. It does not appear that the bill before us was sent up surreptitiously. Tenth assignment.—The 41st section of the criminal procedure act of March 31, 1860, is a summary (say the codifiers) of the 144th, 145th, 146th, 147th, and 148th sections of the act of 14th April, 1834, which are left unrepealed: 1 Brightly, note C., p. 385. The *venire* awarded under 147th section, makes no distinction between the bystander and persons in the county at large. Nor does the 41st section of the act of 1860 make a discrimination. There is no ground therefore to support a distinction, and it certainly infringes no rule of right or of policy to hold that under an order of *talesmen*, the *venire* must issue generally, and not specially to summon the bystanders only, or specially for persons from the body of the county only. Under the criminal procedure act, the sheriff may summon the talesmen from either or both. The expression, *tales de circumstantibus*, was evidently intended to include both.

The 14th and 15th assignments relate to the evidence of finding the body of Daniel M. Kraemer three hundred yards from the house; the condition of the chest, bureau and desk, and the fact that a large sum in silver and gold was known to the prisoner to be in the house. That the commission of a distinct offence, even similar in character, cannot be given in evidence against the prisoner, was held in *Shaffner vs. Comth.*, decided at Harrisburg in 1873. But when two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gestæ*, and tend to throw light on the motive and manner of the murder for which the prisoner is indicted, the case is different. Such was the case here. The club found near to the husband, being the probable instrument of the death of the wife also, and the motive, to wit, robbery, being one and the same, which led to the murder of both at the same time. Being parts of the same *res gestæ* they, together, tend to throw light on each other, and

[*Original Edition, p. 196.]

there is no reason that the truth should be thrown out by excluding the evidence objected to. The 16th, 18th, 19th, 21st, 22d, 24th, 25th, 26th, and 34th assignments relate to the same subject. When we consider that Kraemer was a farmer living in the country remote from a place of safe deposit, and was unused to the ways of men living in town; that it was a period of suspension of specie payments, when silver and gold seek hiding places in the chests, drawers, and desks of such men as he, and often remain hidden for years, we cannot say the time when he and his wife received the coin was too remote, and its possession on the night of the murder impossible. The prisoner was the son of a neighboring farmer, and was without means of his own. This possession of coin and exchanging it for paper money and purchase of clothing, on the next day, at *Pottsville, were significant circumstances, while the evidence of his identity as the person exchanging the coin in Pottsville might require the testimony of many witnesses and many circumstances, to make the proof complete. We discover no error in these assignments.

28d Assignment. The fact that a witness was examined in a certain prosecution, is a matter independent of the record. He may state that fact as inducement, without producing the record: when the purpose is merely to prove the identity of the person then on trial. The most important question which arose in the trial was that to which the 28th, 29th and 30th assignments relate, to wit, the admissibility of the so-called confessions of the prisoner to John J. Kaercher. But we meet an insurmountable obstacle to its decision in the fact that the testimony of Kaercher, and of the witnesses called to show the influence used to obtain the confessions, has not been made a part of the bills of exception.

Without the whole of the testimony of these witnesses before us to enable us to sift it, and discover the nature and extent of the influence used, it would be very unsafe to say the judge erred in admitting the confessions. We cannot say that he subsequently erred in submitting it to the jury on the evidence, to say whether any improper influence was used, and in charging them, if there were any, that they should disregard the confessions. This did the prisoner no harm, and might, if true, have availed him much. It is proper, also, to add that the disclosures drawn from the prisoner were rather deductions of certain specific facts than confessions of guilt. It is true that these facts were links in the chain of circumstances to convict the prisoner, and therefore his admissions were to be strictly guarded against any improper influence used to obtain them, but they stand lower in the degree of evidence than actual confessions of guilt. A damaging fact may be admitted without any intention to confess guilt.

The 31st, 32d and 33d assignments relate to the testimony of Joseph Trumbo, who was permitted to testify to conversations with the prisoner through the soil pipes of the prison. Whether the voice of the prisoner could be recognized by Trumbo through these pipes, and what weight would be given to testimony, were matters within the province of the jury.

If the offer of such evidence had come from the prisoner, it

[* *Original Edition*, p. 196.]

would have been an error to reject it. *E converso* it was not error to receive it on part of the commonwealth.

Speaking-tubes are used in all large hotels and business houses, and it would be going too far to say, as a matter of judicial knowledge, that the voices of those speaking through them cannot be distinguished. The 35th, 36th and 37th assignments are defective, in that the evidence is not made a part of the bills of exception.

The offers of evidence distinctly state that the dying declarations of Mrs. Annetta Kraemer were made when she was fully conscious of her *approaching death. In the absence of evidence to prove the fact to be otherwise, we must presume that the evidence of her consciousness of approaching dissolution, was sufficient as well as satisfactory to the court.

The whole charge is assigned for error. There seems to be no good reason for this. We discover, nothing erroneous in the portion commented upon in the argument. The indictment consisted of a single count for murder, and the court told the jury that under it they might either acquit or find the prisoner guilty of murder in the first or second degree, and they should find the degree of murder in their verdict.

The complaint against this part of the charge is, that the court did not instruct the jury that there might be a conviction of manslaughter under the count for murder. The court was not asked to give any instruction on the subject of manslaughter, and for the very good reason that nothing appeared in the evidence on the part of the commonwealth or of the prisoner, to reduce the homicide to manslaughter. It was a question whether the prisoner was the guilty one who took the lives of this aged couple; but there was no question that the homicide was a foul and devilish murder committed for the purpose of robbery. It was no substantial injury to the prisoner therefore to omit to instruct the jury that, as an abstract principle of law under a count for murder, there may be a conviction of manslaughter.

The other assignments of error need not be noticed. We discover no error in the record, and the sentence and judgment of the criminal court is therefore affirmed, and the record ordered to be remitted for execution.

THE DILIGENT FIRE ENGINE CO. *vs.* COMMONWEALTH *et rel.* LEHMAN.

A contributing member of an engine company, declared not to have such a legal status, under the law creating the corporation as would enable him to invoke the action of a court to reinstate him as a member.

Error to the Common Pleas of Philadelphia. Opinion delivered May 11, 1874, by

MERCUR, J.—A corporation being a mere creature of the law, possesses those powers only which are given to it by its charter, either expressly or impliedly, as necessary in strict furtherance of the objects of its creation. It can exercise no power or authorities, except such as are conferred or authorized by its charter, or those neces-
[*Original Edition, p. 197.]

sarily incident to the power and authorities thus granted, and, in estimation of law, part of the same: *Wolf vs. Goddard*, 9 Watts, 550. The plaintiff in error was incorporated under the act of April 1, 1831: Pamph. Laws, 316. The sixth section of the act declares, that the "corporation shall not consist of more than one hundred active members, and also, that this corporation may bestow the privileges of honorary membership on such *active members as they may think proper, and under such regulations as the by-laws may prescribe." Thus the charter limits the number of active members, and gives no authority to make any person an honorary member, unless he has previously been an active member. In subordination to this organic law, section third, article first, of the by-laws declares, "honorary membership may be conferred upon such active members of five years' standing, who shall have paid all dues and fines, and attended a number of fires equivalent to one-half those occurring during their service; and upon such others as shall pay twenty-five dollars for the privilege. Honorary members shall be entitled to all the rights and privileges of active members, and shall have the privilege of resuming active membership with their original standing on the roll, by making application in writing to the company."

Not content, however, with exhausting the powers given by law for the election of members, the by-laws proceed further. Section four declares: "Contributing members shall be elected in the same manner as active members. They shall not be allowed to vote upon any question before the company, or have command of the apparatus, nor be eligible to any office or standing committee." Section second of article third declares the "dues of contributing members shall be two dollars per year, payable at the stated meeting in January; and any member who shall neglect or refuse to pay the same on or before the stated meeting in July, his name shall be stricken from the roll." The design evidently was to extend a kind of social relation only to contributing members. The right of suffrage was denied to them. They are declared ineligible to office. They had no power or authority affecting the business of the corporation. The only duty imposed on them was the payment of a small sum annually. The only penalty imposed for a violation of that duty, is that the delinquent's name be stricken from the roll.

It is true the power of admitting new members being incidental to a corporation aggregate, it is not necessary that such power be expressly conferred by the statute. Yet when the statute does limit and restrict the power, it erects a barrier beyond which no by-laws can pass. The power of this corporation was so restrained. It extended not to the admission of contributing members. No corporation can make valid any by-law in conflict with its charter. That would be to enable the corporation to make a new constitution for itself, and thereby wholly defeat the object of the law which gave it birth.

If the relator had been a legal member of the corporation, he could not have been removed without notice, for the non-payment

[*Original Edition, p. 198.]

of his arrearages: *Commonwealth vs. Pennsylvania Beneficial Society*, 2 S. & R. 141; *Commonwealth ex rel. Fischer vs. The German Society*, 3 Harris, 251.

The facts were sufficiently averred in the answer of the plaintiff in error. It follows, therefore, that the relator as a contributing member, has *no such legal status, under the law creating this corporation, as will enable him to invoke the action of a court to reinstate him as a member.

The learned judge, therefore, erred in entering judgment on the demurrer, in favor of the relator, and it must be reversed.

Judgment reversed.

Court of Common Pleas, Forest County.

FIRST NATIONAL BANK, CERRY, vs. L. & M. CHILDS.

Mechanics, miners, laborers and others claiming under the act of April 9, 1872, must give notice in writing to the officer executing the process before the actual sale of the property; in default of this notice, no lien. Construction of said act and its requirements.

Sur exceptions to auditor's report. Opinion of the court delivered by

WETMORE, P. J.—At common law, a lien on personal property consists in a mere right to retain possession until the debt or charge is paid. Thus liens generally arise from bailment, are founded on usage, and only have force and validity while the goods are in possession of the bailor. The ordinary cases of liens are factors, inn-keepers, warehouse-men, common carriers, etc. In all these cases in order to create a lien, there must be a delivery of the property. It must come into the possession of the party claiming the lien, or his agent.

The ordinary understanding of a lien on personal property, is the right to detain the property in possession till the claim or charge constituting the lien is satisfied. By the first section of the act of the 9th of April, 1872, entitled "an act for the better protection of the wages of mechanics, miners, laborers and others," Pamphlet Laws, 1872, pages 47 and 48, it is provided that the wages of labor, not exceeding six months immediately preceding the sale, and not exceeding two hundred dollars, shall be a lien, and shall be preferred and first paid out of the proceeds, etc. This part of the act only relates to personal property, as the claim to by a lien on real estate must be filed in the prothonotary's office.

The second section of the act provides that it shall be lawful for such laborers and others to give notice in writing of their claim or claims, and the amount thereof to the officer executing the writ, at any time before the actual sale of the property levied on, and the officer shall pay out of the proceeds the amount which each laborer is justly and legally entitled to receive.

The statute creates a lien on personal property without any record, statement, or memorandum of the same filed or recorded in any place. No act on the part of the claimant is required to give

[*Original Edition, p. 199.]

it force, and no possession of the property on which the lien exists is necessary to give notice to creditors or vendees of its existence.

* The remedy is the means employed to enforce a right. The only remedy provided in this act is contained in the second section, which says it shall be lawful for the claimant to give notice in writing of his claim and the amount thereof at any time before the actual sale of the property levied on. In proceedings at law the claim must be sued within the time required, and the pleadings, trial, judgment, and execution must be according to legally established rule.

A claim giving a complete right of action is useless unless it is asserted according to the prescribed modes: the right can only be established and enforced according to legal remedies. The first section of the act in giving time creates the lien, and the second section provides a time and way for the claimant to give notice of his claim.

The provisions of the second section were not complied with, and no notice given as therein provided; the claimants gave no notice until after the sheriff's sale.

As a rule of exposition, statutes are to be construed in reference to the principles of common law: Dwarrris on Statutes, p. 185. Liens have been looked upon with jealousy, being considered as encroachments on the common law: Bouvier's Law Dict., 14th Ed., Title Liens, vol. 2, p. 47. The parties claiming the benefit of the lien given by the statute should, therefore, have given notice in writing as therein directed. The execution creditors, the sheriff and lien claimants would then know what there is against the property to be sold, and regulate their action accordingly. To sustain the claims in this case, permits a sale of property with secret liens against it, which the execution creditor has no means of ascertaining, and after the sale he is deprived of the fruits of his execution by awarding them to the claimants of the fund made by the sale.

The lien created by the statute is on the *property*, but the present claim is on the *fund* arising from its sale. To construe the statute with reference to the principles of common law so as to avoid secret liens at the time of the sheriff's sale, requires the claimant to give notice to the officer in writing, before the sale, of his claim and the amount thereof.

The report of the auditor is, therefore, reformed and corrected as follows: The item \$967.70 allowed to claims for labor is stricken out, and that amount of money is appropriated to *fi. fa.* No. 43, December term, 1873. With this modification the report of the auditor is confirmed.

*Court of Common Pleas, Luzerne County.

MORRIS *et al.* vs. HANNICK.

1. The statute of limitations never extinguishes a debt; it only forms a bar to the remedy to recover it by action.
2. Where several remedies are given, the party entitled to them may select that which is best calculated to serve his ends.
3. The act of February 24, 1806, authorizing judgments to be entered by the prothon-

[*Original Edition, pp. 200 and 201.]

etary on notes and other instruments, with confession of judgment attached, gives an additional remedy for collection to which the statute of limitations does not apply.

4. Where a debt, even though it be "grounded upon any lending or contract, without specialty," is acknowledged by a debtor under the form of a note, with confession of judgment attached, it may be entered in judgment and collected, notwithstanding more than six years have intervened between the maturity of the note and the entry of judgment upon it.

Rule to open judgment. Opinion delivered April 6, 1874, by

HARDING, P. J.—It is conceded here that the defendant became indebted to the plaintiffs, during the early part of the year 1865, in the sum of one hundred and twenty dollars, for which he gave a note as follows:

"\$120.

PITSTON, February 7, 1865.

"One month after date I promise to pay Morris & Walsh, or bearer, one hundred and twenty dollars, with interest, without defalcation or stay of execution, value received. And I do hereby confess judgment for the said sum, with interest, cost of suit and a release of all errors, waiving inquisition, and confessing condemnation on real estate. And I do further waive all exemption laws, and agree that the same may be levied by attachment upon wages for labor or otherwise.

(Signed) MICHAEL HANNICK."

The plaintiffs held this note eight years and upwards, or until December 15, 1873, when they made application to the prothonotary to have judgment entered upon it against the maker, which was accordingly done; and thereupon they proceeded by execution to collect their money.

At this stage of the case, the defendant came in with an affidavit, setting forth several matters by way of an avoidance, but alleging specially that if the plaintiffs were permitted to proceed with their execution, he would be deprived of the right to interpose the plea of the statute of limitations. Indeed, as developed subsequently, this constituted the sole basis of his resistance to the proceedings on the judgment.

Can the plea, *non assumpsit infra sex annos*, avail in Pennsylvania against an ordinary note for a sum of money, with confession of judgment attached, where the holder has failed to have judgment entered against the maker, until the expiration of six years after the maturity of the note? The act of 27th March, 1813, *Purd.* 930, pl. 18, provides, ". . . . *that all actions of debt grounded upon any lending or contract, without specially shall be commenced and sued within the time and limitation hereafter expressed, and not after, that is to say, within six years next after the cause of such actions, and not after."

That the note in question is not a *specialty*, will be assented to at once. A *specialty* is defined to be a writing sealed and delivered, containing some agreement: 1 *Binn.* 261; 2 *S. & R.* 503; a writing sealed and delivered, which is given as a security for the payment of a debt, in which such debt is particularly specified: *Bac. Ab. Obligation, A.* And though it be not said in the body of the writing that the parties have set their hands and seals, yet if the in-

[**Original Edition*, p. 202.]

strument be really sealed it is a specialty; but if it be not sealed, it is not a specialty, even though the parties in the body of the writing make mention of a seal: 2 S. & R., *supra*.

Again, a note of this character has no analogy with certain causes of action, not grounded in specialty, which have hitherto been adjudicated as being outside of the applicability of the statute of limitations. For example, it has no analogy with an action of debt on a foreign judgment, as in *Richards vs. Brinckley*, 13 S. & R. 395; nor with a claim for a legacy, as in *Thompson vs. McGraw*, 2 W. 161; *Doebler vs. Traveley*, 5 W. 225; nor with the claim of a widow for interest on a third of the purchase money on her husband's real estate, sold by an administrator, as in *Dillenbaugh's Estate*, 4 W. 177; nor with a claim for a distributive share of personal estate under the intestate laws, as in *Patterson vs. Nichol*, 6 W. 379; nor with an award at common law, as in *Rank vs. Hill*, 2 W. & S. 56; nor with a recognizance in the Orphans' Court, as in *DeHaven vs. Bartholomew*, 7 P. F. S. 126. Being then neither a specialty, nor within the category of causes of action to which the statute of limitations does not apply, the inquiry is put with apparent pertinence, why should not the judgment be opened, and the defendant thereby allowed to avail himself of a plea which has had statutory recognition in this country for a century and a half and upwards?

In *Brown vs. Sutter*, 1 D. 239, Judge Shippen said, that the court would never open a regular judgment to let in a plea of the statute of limitations. But in *Eckel vs. Sneyely*, 3 S. & R. 272, Chief-Justice Gibson modified this doctrine somewhat, though the point then under consideration had reference to the form of action, and not to opening a judgment regularly entered. He said in that case, that the plea of the statute of limitations being no longer an unconscionable one, as was considered in *Schook vs. McChesney*, 4 Y. 507, and in the *Bank vs. Israel*, 6 S. & R. 294, the rule of practice would not be recognized to the extent it had been in *Brown vs. Sutter*.

In disposing, however, of the question raised by the proceeding before us, it is not vitally material to what extent the rule of practice referred to *may be recognized either in respect to forms of action or causes of action; it is enough that there is something else to be considered here besides the statute of limitations. The act of February 24, 1806, Purdon, 825, pl. 32, provides, that "it shall be the duty of the prothonotary of any court of record within this commonwealth, on the application of any person being the original holder, or assignee of such holder, of a note . . . in which judgment is confessed, . . . to enter judgment against the persons who executed the same, for the amount which, from the face of the instrument, may appear to be due," etc. Whenever, therefore, a debt, even though it be "grounded upon any lending or contract, without specialty," is acknowledged by a debtor under the form of a note, with confession of judgment attached, it comes within the provisions of this act of assembly, and may be entered in judgment and collected, notwithstanding more than six years have intervened between the maturity of the note and the entry of judgment upon it. The act simply gives to the creditor or holder of the note an ad-

[*Original Edition, p. 203.]

ditional remedy for its collection. No principle of law is more firmly established than that, when several remedies are given, the party entitled to them may select that which is best calculated to serve his ends. It is not denied that the judgment here represents a subsisting indebtedness. Now, the statute of limitations never extinguishes a debt; it only forms a bar to the remedy of the holder to recover it by action: *Higgins vs. Scott*, 22 Eng. Com. L. R. 176; *Leasure vs. Mahoney Township*, 8 W. 551; *McCandless Estate*, 11 P. F. S. 11. But it is not that remedy which these plaintiffs are pursuing; on the contrary, they have selected the remedy attaching to the confession of judgment, and to this the statute of limitations does not apply. They have indulged the defendant eight years and more; he seeks now to avoid payment altogether, because he was not pushed to the wall inside of six years.

The rule is discharged.

Court of Common Pleas, Philadelphia.

VANARSDALEN vs. WHITAKER.

Equity will not restrain a proceeding by landlord against tenant for possession upon grounds, such as change of title, which may be asserted by the tenant in the proceeding itself.

In equity. Motion to dissolve special injunction. Opinion delivered June 10, 1874, by

PEIRCE, J.—This bill is filed to restrain the defendant, Robert Whitaker, from proceeding at law as landlord under the act of 1830, to recover possession of the premises No. 250 South Sixth street.

The plaintiffs allege that they are not tenants of Whitaker, but that they are vendees in possession of the premises under a contract of purchase *of them from him. If so, they can defend at law in the proceeding to recover possession, by showing that the relation of landlord and tenant does not subsist between the parties; or that if it did, it has been determined by the contract of purchase, and possession under it, which they now set up as the ground of this bill.

The remedy sought by the plaintiff in the landlord and tenant proceeding is purely legal, and the defence is purely legal. There is no reason, therefore, why a court of equity should interfere.

It is unnecessary, and therefore improper, to express any opinion in this proceeding as to the legal effect of the papers on which the parties respectively rely, or on any of the questions which may arise in the proceeding before the alderman. The special injunction is dissolved.

District Court of Philadelphia.

LEECH vs. LEECH, DEFENDANT, AND THE PHILADELPHIA BOARD OF BROKERS, GARNISHEE.

The proceeds of the sale of a seat in the Board of Brokers of a member who failed to settle with his creditors, when sold under the articles of association of the Board, are first applied to his creditors in the Board.

[* *Original Edition*, p. 204.]

Opinion delivered *June 27, 1874*, by

LYND, J.—We are spared the necessity of deciding whether the seat of a member of The Philadelphia Board of Brokers is a mere personal privilege or personal property; whether, when such seat has been sold, in consequence of the insolvency of such member, he (or his creditors) can, in any event, claim any part of the proceeds of such sale.

Under the articles of association of said Board, "the seat of a member who fails to settle with his creditors within a year from the time of his suspension, shall be sold by the secretary, and the proceeds shall be paid *pro rata* to his creditors in the Board." The seat in question was regularly sold in pursuance of this provision, and the proceeds are insufficient to discharge the claims of defendants' creditors in the Board.

Surely the effect of the provisions just quoted, was to place the seat (without regard to its technical designation or classification) in the hands of the secretary, in pledge to pay the claims his fellow members might have upon him in the event of his suspension and of his failure to settle with his creditors within one year from the date thereof. Upon this condition he became possessed of his seat. Can he now repudiate the condition? Have his outside creditors any higher rights?

When he, or they, shall have paid off the claims of his fellow brokers upon this fund, there will be room for the discussion of the question presented on behalf of the plaintiff, at the argument of this case stated. Judgment for the garnishees.

***District Court of Philadelphia.**

THE FOURTH NATIONAL BANK vs. FRAZIER.

1. The maker of a promissory note is by the form and effect of his contract a principal, and cannot reduce his responsibility to the holder to that of a surety by proof that he made the note for the accommodation of another party and that that was well known to the holder at the time he received it.
2. Therefore the maker of a promissory note is not discharged from responsibility to the holder who discounted it for another person, by proof that the holder knew that the maker was an accommodation maker and neglected to issue an execution upon a judgment which he held as a security for the note, when notified to do so by the maker.

Rule for a new trial. Opinion delivered *July 17, 1874*, by

THAYER, J.—The facts as they appeared upon the trial were that the defendant made his promissory note for \$2,500 payable to the order of James S. Chambers, who endorsed it. The note was made for the accommodation of Alexander Cummings, who procured its discount by the plaintiffs, the bank placing the proceeds to his credit. At the time of obtaining the discount Cummings confessed a judgment to the plaintiffs for a larger amount as a security for the note and for renewals of it. When the note in suit (which was a renewal of the original note) fell due, the defendant, who was the maker of the note, notified the plaintiffs to proceed against Cummings upon the judgment which they held against him, and it was admitted on the trial that by an execution against Cummings at

[*Original Edition, p. 205.]

that time the money might have been made. The plaintiffs neglected to do so, and Cummings' property was swept away by the executions issued by other creditors. The question is whether the defendant is discharged from responsibility to the plaintiffs by reason of these facts. He insists that, although he was maker of the note, yet as he was an accommodation maker and as that was well known to the plaintiffs when they discounted the paper for Cummings, his real relation to the plaintiffs was that of surety only, and that having neglected upon due and sufficient notice from the surety to proceed against the principal, the plaintiffs have lost their remedy against him.

It was settled many years ago, in *The Bank of Montgomery County vs. Walker*, 12 S. & R. 382, and 9 Id. 229, that the maker of a promissory note cannot reduce his liability to that of a mere surety by proof that he made the note for the accommodation of another party, and that that was well known to the plaintiffs who had discounted it for the party accommodated with a full knowledge of the facts. "We must assume," said Tilghman, C.-J., "this broad principle that the man who draws a promissory note for the purpose of negotiation must stand to it. He has *placed himself in the situation of principal, and shall not afterwards escape by alleging that he was but a surety. Although the plaintiffs knew that the defendant received no value from Walker and George, the payees, yet they knew also that it was his choice to serve his friend by placing himself in the front of a negotiable instrument, and they had a right to suppose he was willing to abide the consequences. We think it safest for the mercantile world in general as well as for the parties immediately interested in accommodation paper to lay down the law on these principles, which are warranted by the best authority." It was accordingly held in that case that the defendant, who had made the note for the accommodation of another person, was not discharged by the fact that the holder with a knowledge of that fact had given time to that person.

Judge Duncan, in deciding the same point in the same case two years before, had already expressed himself to the same effect. "The man," said he, "who, to serve his friend, lends his name as his debtor, in order that he may obtain money on that evidence of debt, cannot complain of it as a grievance that, when this purpose is answered, the law will consider him just in the character he has assumed. If drawer, to be treated as drawer, if endorser, as endorser. As he chose to be introduced into the world by the name and in the character of drawer, he must be content to pass through in all its stages under that name, and he cannot at his pleasure cast it off and deny it to any who has given credit to the paper on his assumed name and character. It shall be taken *pro veritate* that he was the drawer, for *de veritate* that was the very thing he was intended to be:" 9 S. & R. 240.

The Bank of Montgomery County vs. Walker has been so often recognized and approved by the Supreme Court that the doctrine of that case must now be regarded as the settled law of this State. I will refer to two only of the later cases which fully confirm and

[*Original Edition, p. 206.]

corroborate it: *White vs. Hopkins*, 3 W. & S. 99, and *Lewis vs. Hanchman*, 2 Barr, 416. In the former case the doctrine was carried to the extent of deciding that an accommodation acceptor was not discharged by a formal release of the drawer by the holder, who had full knowledge when he received the bill that it had been accepted only for the accommodation of the drawer and that the acceptor had received no consideration whatever. If an accommodation maker of a note or acceptor of a bill is not discharged by a formal release of the person accommodated and whom he brings forward to stand in his place as a principal while he himself assumes the more modest one of a surety, *a fortiori* is he not discharged by a mere neglect to pursue him, which is the present case?

But *Lewis vs. Hanchman* resembles the present case still more strongly. It was there held that the maker of certain accommodation notes was not entitled to the privilege of a surety, although the debt was lost by the neglect of the holder to record a mortgage which he had received as a security for the notes from the person for whose accommodation the notes were made.

These decisions rest upon the principle that one who by the form of his contract has consented to assume the responsibility of a principal, shall not be permitted to show, in the teeth of his contract, that he ought only to be regarded as a surety. Having expressly agreed to stand as a principal, he shall not be permitted to say that the concomitant circumstances reduce his responsibility to that of a mere surety.

Rule discharged and judgment for the plaintiff on the point reserved.

Court of Common Pleas, Luzerne County.

BAER vs. GARRETT.

1. An appeal from the judgment of a justice of the peace may be dismissed even after an arbitration, where it appears that the amount in controversy exceeded the jurisdiction of the justice.
2. A justice has jurisdiction where the plaintiff's claim, however large, is reduced to or below one hundred dollars by direct payments, or by dealings, amounting to and admitted as payments.

Opinion by

CONYNGHAM, P. J.—The true rule affecting this case is thus briefly stated by Mr. Justice Woodward in *Collins vs. Collins*, 1 Wright, 387: "The result of the authorities seems to be that where the plaintiff's claim, however large, has been reduced to or below one hundred dollars by direct payments, or by dealings, that amount to or are admitted to be actual payments, the justice has jurisdiction."

Under this rule, where the book account of the plaintiff on the debit side exceeds one hundred dollars, and credits are actually given on the other side by payments in mutually appropriated accounts and claim, as a balance, to one hundred dollars, the justice has jurisdiction; but where the debit side exceeds one hundred dollars, the plaintiff cannot give jurisdiction by credits, which the defendant, but for such admission, could only claim as an offset.

See *Stark vs. Ulrich*, 1 W. & S. 57. The same principle is clearly stated in *Evans vs. Hall*, 9 Wright, 235, where Mr. Justice Thompson says "voluntary credits" cannot be given to bring the claims within the jurisdiction of a justice.

Looking, then, to the transcript of the justice in this case, it is clear that the plaintiff's account was beyond his jurisdiction; but he alleges that this is erroneously stated by the justice and is corrected by his testimony. While we are not prepared to say that such testimony will ordinarily be received, if we look at it now, will it help him in the present case? The plaintiff, says the justice, claimed only about forty dollars as really due to him, evidently looking to the offsets which he supposed the *defendant would introduce and not to the definite payments or mutually appropriated claims. But how did the justice ascertain the accounts due between the parties? He says: "Mr. Baer presented a book account of about one hundred and forty dollars, which I looked over and cut out what I thought ought not to be allowed, and added up what I thought should be allowed, and then Mr. Garrett presented a book account of over one hundred dollars, with which I did the same thing; then I deducted the lowest from the highest and rendered judgment for the balance." This was most clearly a distinct adjudication of two different accounts, each exceeding one hundred dollars, and over neither of which accounts had the justice jurisdiction.

Looking either to the transcript or the evidence of the justice, it was a case beyond his jurisdiction, and the appeal and arbitration can make no difference, as virtually decided in *Collins vs. Collins*, *supra*.

The rule reversing and dismissing the whole proceedings in the case for want of jurisdiction is made absolute.

Court of Common Pleas, Luzerne County.

ESTATE OF C. W. MORGAN.

It is the duty of any person desiring an issue to reduce his request to writing, and to present the same under oath to the auditor.

Exceptions to report of auditor. Opinion delivered by

CONYNGHAM, P. J.—The difficulty in granting the relief now asked for arises from the fact that the matter was submitted to the disposition of the auditor and no issue demanded. The paper filed by Mr. Bedford was not under oath or affirmation, as it is imperatively required in all such applications by 5th sec., rule 24, of the court. Being, then, entirely irregular, it was the duty of the auditor to have paid no attention to it, and his return of it to the court, as it has been objected to by the adverse party, gives it no validity. If the issue had even regularly been demanded, by one counsel, representing with others, as the auditor states, before him equitable holders of the claimed judgments, we should have endeavored to interfere, if that counsel, disregarding the wishes of his coclaimants, had sought to dismiss the issue.

Here, however, we must consider the whole matter submitted

[*Original Edition, p. 208.]

to auditor, and unless there be something on the face of the report to show that his decision is wrong, the court must adopt his view of the facts. As he reports the evidence, the report would seem to be correct, and it must therefore be confirmed. The parties appeared before the auditor, and tried the questions in dispute there, and we can discover no reason to reverse his judgment.

It is difficult also to see how an assignee, under a general assignment for the benefit of creditors, "not recorded," as the auditor says, can object to these proceedings.

***Court of Common Pleas, Schuylkill County.**

C. R. DONOUGH vs. JOHN BOGER, JOHN MOODY AND PHILIP STEINBACH.

1. In a suit against three drawers of a joint promissory note, where there has been service of the writ upon two only, a copy of the note and a mere statement filed are sufficient to entitle the plaintiff to judgment against those served—under the 5th section of the act of March 21, 1806.
2. The notice required to be given by surety to a principal in order to discharge him from undoubted legal liability should be clear and explicit to proceed and collect the debt.
3. The notice should be given after the maturity of the note, and reasonable time to proceed should be allowed, and the affidavit should state with certainty all the material facts required.

Rule for judgment for want of sufficient affidavit of defence.
Opinion delivered *March 30, 1874*, by

WALKER, J.—Philip Steinbach, one of the defendants in the above case, in his affidavit, assigns two reasons why judgment should not be entered against him:

1st. On account of the insufficiency of the pleadings.

2d. That being a surety on the note he is discharged from liability.

As to the insufficiency of the statement, it is urged, that the action and pleadings are joint against all three defendants, while the return shows that service of the writ was made only upon Moody and Steinbach, and therefore the plaintiff cannot take judgment against the two served, unless there be an averment in the narr. that the process was issued against the other who was not found. (See *Troubat & Haly*, vol. 2, page 618, formula under note 6.) *Latahaw vs. Steinman*, 11 S. & R. 357; *Boaz vs. Heister*, 6 S. & R. 18. Under the 5th section of the act of March 21, 1806 (*Purdon's Dig.* 1166, pl. 10), a copy of the note and a mere statement has been held sufficient to take judgment. *Morgan et al. vs. Bank*, 3 Pa. Rep. 391; *Clark vs. Dotter*, 4 P. F. S. 215.

Since the passage of the act of April 6, 1830 (*Purdon's Dig.* 1120, pl. 4, P. L. 277), in suits brought against joint and several promisors or endorers of promissory notes in which the writ has not been served on all the defendants, and judgment obtained against those served, such judgment shall not be a bar to recovery in another suit against those not served. See also act of April 11, 1848 (P. L. 536), *Swanzy vs. Packer*, 14 Wt. 441; *Bouman vs. Kistler*, 9

[*Original Edition, p. 209.]

Casey, 106; *Miller vs. Reed*, 3 Casey, 244; *Congehenour vs. Suhre*, 21 P. F. S. 465; *Moore vs. Hepburn*, 5 Barr, 399; *Weikel vs. Long*, 5 P. F. S. 238.

A plaintiff may, therefore, proceed under the ancient form by declaration, or under the new form by statement, as he pleases. *Boaz vs. Heister*, 6 S. & R. 20, Per Duncan, J.

*We therefore think the statement filed is sufficient. If it were not it could be amended on motion.

The second point is that the surety is discharged through the negligence of the plaintiff to commence suit against the principal.

The law is well settled that when the surety desires to be released from liability it is his duty to notify the creditor in an explicit manner to proceed and collect the debt, and upon failure or neglect of the creditor, a court of equity will grant relief: *Cope vs. Smith*, 8 S. & R. 110; *Peter Kellar's Est.*, 1 Leg. Chronicle, 189; *Erie Bk. vs. Gibson*, 1 Watts, 143; *Johnson vs. Thompson*, 4 Watts, 446; *United States vs. Simpson*, 3 Pa. Rep. 437; *Pain vs. Packard*, 13 Johns. 174; *King vs. Baldwin*, 17 Johns. 384; American Leading Cases, vol. 2, 362 to 480 and notes; *Commonwealth vs. Wolvert*, 6 Binney, 292; *Wetzel vs. Spouseler*, 6 Harris, 460; *United States vs. Samuel*, 4 Wash. 620; *Strickler vs. Burkholder*, 11 Wr. 476; *Richard vs. Commonwealth*, 4 Wr. 146; *Shemer vs. Jones*, 11 Wr. 268; *Pittsburgh vs. Shaeffer*, 9 P. F. S. 350; *Wallashlan vs. Searles*, 9 Wr. 45; *Hoffman vs. Bechtel*, 2 P. F. S. 190; *Sesson vs. Barrott*, 6 Barb. 199; *Gardner vs. Ferree*, 15 S. & R. 28; *Conrad vs. Foy*, 18 P. P. S. 381.

The affidavit sets forth that the note in question fell due April 2, 1873, and that suit was not instituted until May 31, 1873, and after John Boger, the principal, left the county.

It further avers that "at or about" the time of the maturity of the note Steinbach told plaintiff that Boger, the principal, had in his possession "property and money" sufficient to pay the note, and that unless plaintiff would instantly proceed against Boger, that he would consider himself discharged. It further avers that Steinbach was a surety of Boger, and that was known to the plaintiff.

1st. Under these circumstances did the delay of plaintiff to proceed against the surety after notice discharge him from liability?

2d. Is this notice sufficient?

As a general rule we think that a creditor, after receiving proper and explicit notice from the surety to sue the principal, should do so at the next court if there is a reasonable time intervening, and nothing to prevent, and should act promptly in obtaining judgment. He would not be required to arbitrate the case unless requested by the surety, or the circumstances of the case clearly required it: *Wetzel vs. Spouseler*, 6 Harris, 460.

After the note fell due, the next term of court was in June, 1873, and the last day for issuing writs to that term was on May 23, 1873. With promptness the plaintiff could obtain judgment in June, if there was a service and no appearance, and this would

be proper despatch in the absence of any extraordinary circumstances.

In the present case the plaintiff did not issue his writ until the 31st of May.

*To discharge the surety he should show that a service could have been made upon Boyer, between the 23d and 31st of May, and that he was injured by this delay. The affidavit is silent upon this point, except that it avers that during a portion of the time between 2d of April and 31st of May, 1873, Boger was within the jurisdiction of the court. What portion of the time? Was it a day or so in the beginning of April? If this was the case the greatest despatch of the plaintiff might not reach him with a service. Again it is not averred that Boger was in the county when and after notice was given. If he was not in the county after notice how is the defendant prejudiced?

And even if he had a service, the affidavit does not state that Boger had any real estate in the county, that would be bound by a judgment. The affidavit should state all material facts clearly and with precision, not in a vague and doubtful manner. The courts incline to scrutinize an affidavit and justly so before they discharge a surety from his legal obligation.

In *Conrad vs. Foy*, 18 P. F. S. 385, Judge Agnew says: "Why should a surety, bound in a solemn bond or note in writing to pay a debt, which his credit enabled his principal to create, be discharged therefrom except upon the clearest equity? and why should the written obligation be blown away by the uncertain breath of witnesses? A notice from a surety to the creditor to proceed against the principal or otherwise the surety will be discharged, ought in justice to be in writing, and in the most explicit terms. But prior decisions have not required this, and we cannot legislate such a rule into existence.

"We have a right to hold, and justice requires us to say, that nothing less than clear and positive proof of the notice given by persons duly authorized to give it, and a notice clear and explicit in its terms, given at a time when the creditor has it in his power to proceed to collect the debt, should discharge the surety from an undoubted legal obligation to pay the debt." See *Wolleshlan vs. Searles*, 9 Wr. 45.

Again this affidavit further states, that the notice was given "at or about" the time of the maturity of the note.

If the notice was given before the note matured, it would be in operation: *Hellen vs. Crawford*, 8 Wr. 105.

The notice must be given after the note matures, and the affidavit should explicitly aver that fact. The words "at or about the time" may mean before its maturity, or they may mean after the maturity. They are uncertain, and therefore insufficient where the time is material.

We do not presume that the defendant can prove before a jury any more than he set out in his affidavit (and therefore if he did not the court would be bound to instruct the jury that unless the defendant showed that notice was given after maturity of the notice

[*Original Edition, p. 211.]

it would not avail him): *Black vs. Halstead*, 3 Wr. 71. The rule for judgment is therefore made absolute.

***Court of Common Pleas, Luzerne County.**

HACKLEY vs. WALSH AND WIFE.

1. There is no exception to the rule, that in actions real a defence which arises during the pendency of the suit may be pleaded in bar of the plaintiff's rights.
2. Upon a trial in the Common Pleas in a proceeding which originated before two justices of the peace by a landlord to obtain possession of demised premises, it is competent for the defendant to set up as a defence that the title of the landlord had been divested during the term, and that he had the right from the owner, whose title had accrued pending the suit, to remain in possession.

Opinion delivered by

CONYNGHAM, P. J.—The plaintiff purchased the land in question at sheriff's sale, as the property of Purdan Walsh, commenced his proceeding to obtain possession, which was removed into this court on the claim of his wife, finally recovered here, and is now entitled to ask the enforcement of his writ of possession, unless the rights of others have become involved.

It seems, however, that in 1862 a conditional recovery of the same land was had upon an ejectment in favor of W. Swetland, claiming to hold the legal title as security for the payment of the purchase-money due on contract. This suit was recognized by Mr. Hackley, claiming to be interested as a purchaser, by his paying the first instalment under the award, though he neglected the latter payments, and thereupon the court ordered an *hab. fac. possessionem*, to which the sheriff returned that he had given possession to Swetland, the then plaintiff. Subsequent to this time S. F. Brown became the purchaser of the property from Mr. Swetland, and claims now to be in his possession under him, by himself and tenants.

If he now is in possession under these legal proceedings, neither he nor his tenants can at this time be removed under the *hab. fac. poss.* against Walsh. The possession must be considered legally changed by proceedings in court, the vendor in the contract having regained his possession, and if Mr. Hackley can now have any claim to the land, he must bring his ejectment, and try his title with the purchaser from Mr. Swetland.

This will be the case, even though Walsh may still be in the actual possession, if, under the force of the execution in favor of Swetland, he attached to him and became his tenant. If he never did so, but is in possession under his original claim, he may now be dispossessed. We refer to the general principles upon which we make our present order to 2 T. & H. Prac., 289-90-1; *Brownfield vs. Bradee*, 9 W. 149; *Newell vs. Gibbs*, 1 W. & S. 496.

The rule then is made absolute so far as to restrain the execution of the writ against S. F. Brown and any of his tenants, even though Walsh may be one of them. It being claimed that he is, in fact, the tenant of Brown under the possession, through the recovery by Swetland. By the proceeding in that ejectment, recognized by Hackley, the possession of Walsh, over which he had any right,

[*Original Edition, p. 212.]

would, as to him, have been terminated, so that legally he might become the tenant of Swetland and Brown.

The rule is made absolute so far as above ordered.

***Supreme Court of Pennsylvania.**

PUSEY, EXECUTOR, vs. DUSENBERRY.

The 21st and 22d sections of limited partnership act of March 21, 1836, apply to existing partnerships only.

Error to the Court of Common Pleas of Bradford County. Opinion of the court delivered July 2, 1874, by

AGNEW, C. J.—This was a proceeding before a referee under an act of April 6, 1869, P. L., p. 725, application to Bradford county, alone.

A limited partnership existed between John G. Ganney and Wm. B. Wightman as general partners, and Joshua Simmons and Jesse Lane as special partners. The referee finds that this partnership expired by its own limitation on the 1st of May, 1856. After this Ganney, Wightman and Lane continued the business, Simmons having withdrawn after termination of the partnership on the 1st of May. In January, 1857, Simmons being unable to obtain a settlement of the affairs of the late firm, filed his bill in equity, setting out the partnership and its dissolution and charging fraudulent appropriation of the assets of the firm. A receiver was appointed and an injunction issued to restrain the defendants from collecting and receiving the assets. Subsequently, and after a rule on the defendants to plead, answer or demur, the parties came to a settlement whereby Simmons obtained from his partners a bond and mortgage for \$2,450, given by Owen Clarke to Jesse Lane, and by Lane assigned to Simmons; and a note made to Ganney & Wightman to the order of Darnell Braddock, endorsed by him, and partly paid by him to Simmons. On this state of the facts, the referee found that Simmons had, by the receipt of these claims, made himself liable as a general partner under the 21st and 22d sections of the limited partnership act of 21st of March, 1836: 2 Brightly, 938, pl. 23 and 24. The 21st section makes void every sale, assignment and transfer of any of the property or effects of the general or special partner, made by him when insolvent or in contemplation of insolvency, with interest to prefer a creditor of his own, or of the partnership, over the partnership creditors. The 22d section declares that every special partner who shall violate any of the provisions of the preceding section, or concur in, or assent to, any such violation shall become liable as a general partner.

We think the conclusion of the referee was erroneous. These sections evidently relate to the affairs of an existing partnership. They are intended to prevent the partners from disposing of their property to the prejudice of the partnership creditors. They do not apply the case of a partnership already dissolved, where legal proceedings have been instituted by the special partner to enforce settlement of the partnership affairs. A *bona fide* compromise of such

[*Original Edition, pp. 213 and 214.]

a proceeding and the receipt by the special partner of what he believes to be justly due to him, ought not to have the effect of turning him back by relation into a partnership expired by its own limitation, and from which he had, in fact, withdrawn. The law certainly never intended this result. It would be a penalty for the prosecution of what he supposed to be his just rights, inequitable and destructive of the formation of limited partnerships. His receipt of assets that should go to the payment of partnership creditors might be void, so far as to enable these creditors to follow these assets, though this we do not decide, but certainly ought not to operate to make him liable generally to all the creditors. If during the entire existence of the partnership, he has obeyed the law and not made himself amenable as a general partner, it would be a harsh interpretation of the law, that he is thrown backward into a relation long since terminated, and converted into a general partner by the mere pursuit of his rights.

Judgment reversed and a *procedendo* awarded.

Supreme Court of Pennsylvania.

UDDERZOOK vs. THE COMMONWEALTH.

A photograph proved to have been taken from life, and to resemble the person photographed, may be used upon a trial for murder to identify him, though like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury.

Error to the Court of Oyer and Terminer of Chester County. Opinion delivered July 2, 1874, by

AGNEW, C. J.—This is, indeed, a strange case; a combination by two to cheat insurance companies, and a murder of one by the other to reap the fruit of the fraud. Winfield Scott Goss, an inhabitant of Baltimore, had insured his life to the amount of \$25,000.

He was last seen at his shop on the York road, a short distance from Baltimore, on the evening of the 2d of February, 1872, in company with William E. Udderzook, his brother-in-law, the prisoner, and a young man living near. They left him to go to the house of the young man's father. In a short time the shop was discovered to be on fire. After it was burned down a body was drawn out of the fire, supposed to be that of Goss. Claims were made upon the insurance companies, the prisoner being active in prosecuting them. On the 30th of June, 1873, the prisoner and a stranger, a man identified as Alexander C. Wilson, appeared at Jennersville, in Chester county, in this State, and remained over night and the next day. In the evening, July 1, the prisoner and this stranger left Jennersville together in a *buggy. Next day, on being met, and asked what had become of his companion, the prisoner said he had left him at Parkesburg. On the 11th of July, the body of a man identified on the trial as W. S. Goss or A. C. Wilson, was found in Baer's woods, about ten miles from Jennersville, the head and trunk buried in a shallow hole, in one place, and the arms and legs in another. The stranger who was with the prisoner at Jen-

[*Original Edition, p. 215.]

nersville, identified as A. C. Wilson, was traced from place to place, living in retirement, from June 22, 1872, until within a day or two of the time when he appeared with the prisoner at Jennersville. During this interval this prisoner and Wilson were seen together several times under circumstances indicating great intimacy and privacy. Wilson has not been seen or heard of since July 1, 1873, when he left Jennersville in company with the prisoner. The great question in the case was the identity of A. C. Wilson as W. S. Goss. This was established by a variety of circumstances and many witnesses, leaving no doubt that Goss and Wilson were the same person, and that the body found in Baer's woods was that of Goss. All the bills of exceptions except one, relate to this question of identity, the most material being those relating to the use of a photograph of Goss. This photograph, taken in Baltimore on the same place with a gentleman named Langley, was clearly proved by him, and also by the artist who took it. Many objections were made to the use of this photograph, the chief being to the admission of it to identify Wilson as Goss; the prisoner's counsel regarding this use of it as certainly incompetent. That a portrait or a miniature painted from life, and proved to resemble the person, may be sure to identify him, cannot be doubted, though like all other evidences of identity it is open to disproof or doubt, and must be determined by the jury. There seems to be no reason why a photograph, proved to be taken from life and to resemble the person photographed, should not fill the same measure of evidence. It is true, the photographs we see are not the original likenesses, their lines are not traced by the hand of the artist, nor can the artist be called to testify that he faithfully limned the portrait. They are but paper copies taken from the original plate called the negative, made sensitive by chemicals and printed by the sunlight through the camera. It is a result of art guided by certain principles of science. In the case before us such a photograph of the man Goss was presented to a witness who had never seen him, so far as he knew, but who had seen a man known to him as Wilson. The purpose was to show that Goss and Wilson were one and the same person. It is evident that the competency of the evidence in such a case depends on the reliability of the photograph as a work of art, and this, in the case before us, in which no proof was made by experts of this reliability, must depend upon the judicial cognizance we may take of photography as an established means of procuring a correct likeness. The daguerrian process was first given to the world in 1836. It was soon followed by *photography, of which we have had nearly a generation's experience. It has become a customary and a common mode of taking and preserving views as well as the likenesses of a person, and has obtained universal assent to the correctness of its delineations. We know that its principles are derived from science; that the images on the plate made by the rays of light through the camera are dependent on the same general laws which produce the images of outward forms upon the retina, through the lenses of the eye. The process has become one in general use, so common we cannot refuse to take judicial cognizance

[*Original Edition, p. 216.]

of it as a proper means of producing correct likenesses. But happily the proof of identity in this case does not depend on the photograph alone.

Letters from Wilson, identified as the handwriting of Goss; a peculiar ring, belonging to Goss, worn upon the finger of Wilson; the recognition by Wilson of A. C. Goss as his brother; packages addressed to A. C. Goss, and envelopes bearing the marks of the firm with which W. S. Goss had been employed, coming and going to and from Baltimore; and many other circumstances following up the man Wilson, leave no doubt of his identity as Goss, independently of the photograph. The objection to the proof of Goss' habits of intoxication is equally untenable. True, the habit is common to many, and alone would have little weight, but habits are a means of identification, though with strength in proportion to their peculiarity. The weight of the habit was a matter for the jury. It is unnecessary to follow the bills of exceptions in detail. They all relate to facts and circumstances bearing on the question of identity. If the bills of exception are many they only denote that the circumstances were numerous, and in this multiplication consists the strength of the proof. They are many links in a chain so long that it encircles the prisoner in a double fold. The questions put to G. P. Moore, A. H. Barintz and A. R. Carter, were unobjectionable. Whether they really could not identify the dark and swollen face of the corpse, it was not for the court to decide. Its weight belonged to the jury. There was no error in permitting the jury, after their return into the court for further instructions, to take out with them at their own request, the check, due bill and applications for insurance papers, which had been proved, read in evidence, and commented on in the trial. The appearance, contents and handwriting of these documents were no doubt important and to be inspected by the jury, who could not be expected to carry all these features in their minds. It is customary in murder cases to permit the jury to take out for their examination the clothing worn by the deceased, exhibiting its condition, the rents made in it, the instrument of death, and all things proved and given in evidence bearing on the commission of the offence.

We discern no error in this record, and therefore affirm the sentence and judgment of the court below, and order this record to be remitted on execution.

***Supreme Court of Pennsylvania.**

SHEARER vs. BRINLEY.

Where a property has been levied on, and an inquisition and condemnation returned, the lien of judgment is good against lands of a decedent still in possession of the heirs, although there has been no revival within five years of testator's death.

Error to the Court of Common Pleas of Franklin County. Opinion delivered *July 2, 1874*, by

SHARSWOOD, J.—By the thirty-fourth section of the act of February 24, 1834, Pamph. L. 80, it was enacted that “in all actions

[* *Original Edition*, p. 217.]

against the executors or administrators of a decedent, who shall have left real estate where the plaintiff intends to charge such real estate with the payment of his debt," the widow and heirs, or devisees, shall be made parties thereto. As well upon the words as the evident intent of the statute, where at the death of the decedent the land was already charged with the debt, the provision has no application. Such have been the decisions. Thus a *scire facias* on a mortgage is not within the act: *Hare vs. Mallock*, 1 Miles, 263; *Chambers vs. Carson*, 2 Whart. 265; *Wallace vs. Blair*, 1 Grant, 75; nor a *scire facias* to revive a judgment recovered before the death of the decedent: *McMillan vs. Rex*, 4 W. & S. 237; *Riland vs. Eckert*, 11 Barr, 215; *Bennett vs. Fulmer*, 13 Wright, 155. It is equally clear that where the land was charged with the debt before the time when the act of 1834 went into operation, namely, October 1, 1834, it was not necessary to make the widow and heirs, or devisees, parties before proceeding to execution. Were, then, the premises charged with the debt of Samuel Moore to Thomas A. Crawford before the first day of October, 1834? It is true that the judgment recovered against his executors to April, 1827, in the Court of Common Pleas of Franklin County, had not that effect. It was no lien. Under it, however, as the law then stood, the real estate of the decedent might have been seized in execution, condemned and sold. If the case had rested on that judgment alone, no execution could have been issued upon it to reach the land, after the act of 1834, without a *scire facias* to bring in the widow and devisees. This is the extent of *Keenan vs. Gibson*, 9 Barr, 249; *Warden vs. Eichbaum*, 2 Harris, 121; *Kessler's Appeal*, 8 Casey, 390; *McLaughlin vs. McCumber*, 12 Id. 14. What distinguishes the case before us from all these determinations is that before October 1, 1854, there was an execution, a levy on the premises and an inquisition and condemnation returned. This undoubtedly created a lien on the land so levied on; it was in the custody of the law to answer that debt, and, consequently, was already charged with it: *Stauffer vs. The *Commissions*, 1 Watts, 300; *Packer's Appeal*, 6 Barr, 277; *Lea vs. Hopkins*, 7 Id. 492; *Hinds vs. Scott*, 1 Jones, 29; *Riland vs. Eckert*, 11 Har. 215. No one can doubt that a *venditioni exponas*, founded on that levy and condemnation, followed by a sheriff's sale and deed, duly acknowledged, would have divested the title of Samuel Moore on the premises. Without any resort to the seventh section of the act of 1834, which excepts from the repealing clause all such acts as may be necessary to finish proceedings commenced before that time, the thirty-fourth section had no application to this proceeding. It may be worth while, however, to observe that the exception has been held not to apply in favor of an action commenced or judgment obtained against the personal representatives of the decedent before the act, because having no necessary reference to the real estate, no proceeding with such reference can be said to have commenced until execution and levy. But where there was such an execution and levy, there is such a proceeding commenced, which the act allows to be finished without reference to its provisions. We think, therefore, there was error committed by the

[*Original Edition, p. 218.]

learned court below in affirming the plaintiff's fourth point, that the sale of the land in 1838, on the writ of *venditioni exponas*, was invalid, unless a writ of *scire facias* was previously to said sale issued against and served on the widow, heirs at law and devisees of Samuel Moore, deceased.

It is contended, however, that this error cannot avail the plaintiffs here, because it appears on the face of the record that the lien of the debt of Crawford, as against the heirs and devisees of Moore, had expired on the date of the sheriff's sale in 1838. Samuel Moore died in 1825. The period of limitation of the lien of his debts was then seven years by the act of April 4, 1797. Sec. 4, 3 Smith, 297: "After the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his or her heirs, executors or administrators, within the said period of seven years." It has been settled that the effect of an action within seven years, duly prosecuted to judgment, was to extend the lien by analogy to the act of April 4, 1798, sect. 2, 3 Smith, 331, five years longer, that is, for twelve years from the decease of the debtor: *Trevor vs. Ellenberger*, 2 Penna. Rep. 94; *Penn vs. Hamilton*, 2 Watts, 53; *Fetterman vs. Murphy*, 4 Id. 429; *Steel vs. Henry*, 9 Id. 523; *McLaughlin vs. McCumber*, 12 Casey, 14. As these decisions have been subsequently explained, this court adopted the analogous provisions of the act of 1798 to determine what was an action duly prosecuted within the act of 1797: *Steel vs. Henry*, 9 Watts, 523; *Payne vs. Craft*, 7 W. & S. 465. More than twelve years from the death of Samuel Moore had elapsed when the title of his devisees was attempted to be divested by the sheriff's sale. Without any question, the general lien of the debt, as against them, was then gone. But the point now to be determined is whether the levy or condemnation at a time when the lien of the debt *was in full force, and when such seizure and levy was perfectly lawful and regular, was a sufficient due prosecution of the action without a revival of the judgment? Nothing is better settled than that under the act of 1798 it was sufficient and that no revival of the judgment within five years was necessary: *Young vs. Taylor*, 2 Binn. 258; *Commonwealth vs. McKisson*, 13 S. & R. 144. The mischief of such a particular secret lien, when the general lien of the judgment had expired, occasioned the passage of the act of March 26, 1827, sec. 2, 9 Smith, 303: *Ebright vs. The Bank*, 1 Watts, 397. Shall the analogy of the act of 1798 be still further carried out by applying to the act of 1797 the provision of this supplement of 1827? This was one of the questions which arose in *Steel vs. Henry*. Mr. Justice Kennedy remarked: "The acts of 1827 and 1829, relative to the liens of judgment and prescribing the mode to be observed and pursued with a view to continue such liens in force, have no application to judgments obtained against the personal representatives of deceased debtors, and not being very reasonable in some of their provisions, as regards the continuance of the liens under judgments obtained against the debtors themselves, it is therefore not very probable that courts will ever be disposed to extend their principles to cases not falling within either the letter or spirit of

[*Original Edition, p. 219.]

these acts." *Steel vs. Henry* went off upon another point. The question, however, did arise, and was the very *ratio decidendi* in *Payne vs. Craft*, 7 W. & S. 465. "It had been argued," said Mr. Justice Kennedy, "that the directions of the acts of 1798, 1827 and 1828, for continuing the liens of judgments therein mentioned, ought to have been observed and strictly complied with by Mr. Ross in order to continue the lien of his debt after he had obtained judgment for it. In answer to this, however, it is sufficient to observe that these acts, of assembly do not embrace judgments originally obtained against the executors or administrators of a deceased debtor, but extend merely to judgments obtained against the debtor himself in his lifetime, whereby liens are created on his real estate for the sums recovered." He goes on to say: "The farthest that this court has gone was to adopt, upon a principle of analogy, the five years mentioned in these acts, and to hold that nowhere proceeding had been had or act done on a judgment obtained against the personal representatives of a deceased debtor, negating the idea of its being paid within five years after the seven years from the debtor's death had expired and the judgment had been obtained, the lien of the debt on the real estate, late of the said debtor, should be considered as extinct and gone." It is true that the late Mr. Chief-Justice Thompson, for whose *obiter dicta* even no man can have a greater respect than I have, in *McLaughlin vs. McCumber*, expressed the opinion that the act of 1834 had changed the law as laid down in *Steel vs. Henry* and *Payne vs. Craft*; and he refers to the twenty-fifth section as forbidding by express provision an implication that the *lien might be continued by execution on the first judgment by the express declaration that the lien shall not be continued against the real estate of the decedent unless revived by the *scire facias* every five years. But the twenty-fifth section is confined to judgments which at the time of the death of the decedent shall be a lien on his real estate; and even as to them the provision to which he refers is, "Such judgment shall not continue a lien on the real estate of such decedent as against a *bona fide* purchaser, mortgagee or other judgment creditor of such decedent unless revived by *scire facias* or otherwise, according to the laws regulating the revival of judgments." It is accordingly well established that the lien of a judgment against a decedent at the time of his death, as against his heirs or devisees, is without limit and needs not to be revived every five years in order to be executed at any time on lands still held by them: *Fetterman vs. Murphy*, 4 Watts, 424; *Bropst vs. Bright*, 8 Id. 124; *Wells vs. Baird*, 3 Barr, 351; *Kontigmaker vs. Brown*, 2 Harris, 269; *Aurand's Appeal*, 10 Casey, 151; *Bindley's Appeal*, 19 P. F. Smith, 295. The decision in *McLaughlin vs. McCumber* that on a judgment against the personal representatives of a decedent, obtained prior to October 1, 1834, a *testatum fi. fa.* could not be issued and executed on land without calling in the heirs or devisees, was undoubtedly right. In that case there was no lien, particular or general, at the time when the act of 1834 went into operation. On the whole, then, we have arrived at the conclusion that though the general lien of the debt of Thomas H. Crawford against the other

[Original Edition, p. 220.]

lands was gone at the time of the sheriff's sale, yet the particular lien, acquired by the levy and condemnation on these premises, still subsisted, unaffected by the lapse of time, and the sale by the sheriff, under the *venditioni exponas* issued upon it, divested the title of the devisees of Samuel Moore and vested a good title in the purchaser.

Judgment reversed.

*Supreme Court of Pennsylvania.

McFERREN vs. THE MONT ALTO IRON COMPANY.

1. Testimony irrelevant for one purpose, may be admissible for another.
2. A party competent prior to the passage of the act allowing parties in interest to testify, is not rendered incompetent by that act.

Error to the Common Pleas of Franklin County. Opinion delivered July 2, 1874, by

WILLIAMS, J.—If the purpose of the offer embraced in the first assignment was to establish the defendant's right to the use of the road in question, either under the alleged license or the reservation in the deed of Hughes to Bricker, then so much of the offer as relates to its use by other persons in the neighborhood was irrelevant; but if its purpose was to show the existence of the road, and that it was located where the defendants claimed the right to its use under the reservation, there was no error in its admission. Nor was there error in refusing to withdraw the evidence from the jury as requested in the plaintiff's fourth point. The court instructed the jury in answer to this point, that "the defendants have not claimed that a public road exists by prescription. They claim under the reservation in the deed, and point to the use of the road by the furnace people and others, for years before the date of the deed, as evidence to indicate the road referred to in the deed, and this is the issue raised by the pleading which we submit to you." So far as the evidence tended to indicate the road referred to in the deed of Hughes to Bricker, it was clearly admissible, and, under the instructions of the court, this was the only purpose for which it was submitted to the jury.

The next assignment raises the question, whether the plaintiff was a competent witness; and if so, whether the facts proposed to be proved by him were material and relevant to the issue? He purchased the lot upon which the trespass is alleged to have been committed, of Bricker, to whom Hughes, by deed dated March 13, 1854, conveyed it, "reserving however, the road as it is." By a subsequent deed dated August 1, 1864, Hughes conveyed the adjoining land, known as "the furnace property," to the defendants, "together with all and singular the buildings, improvements, . . . ways, etc., thereunto belonging, or in anywise appertaining." Under this deed the defendants claimed the right to the use of the way or road in question, alleging that it was the road reserved in the deed of Hughes to Bricker. The court rejected the plaintiff as incompetent to prove matters occurring between himself and Hughes, the latter

[*Original Edition, p. 221.]

having died before the trial. But was he an incompetent witness for the *purpose for which he was offered? He was not called to testify to anything connected with the sale and conveyance of the lot to Bricker, upon which the trespass is alleged to have been committed, or in relation to the sale and conveyance of the furnace property to the defendants, under which the right of way is claimed. He was offered for the purpose of proving matters having no connection with either conveyance. He purchased from Hughes a lot containing nine acres adjoining the one sold to Bricker. Why was he not competent to prove that there was a road through "the nine acre lot" when he bought it, and that it was changed to its present location, between "the Bricker lot" and "the nine acre lot?" That there was such a road, and that its location was changed, were facts independent of the deed for the lot, and wholly unconnected with the contracts between Hughes and Bricker, and Hughes and defendants, which are involved in this action; facts which, if not true, could be disproved by persons in the neighborhood as readily as by Hughes himself, if he were living. Why then should the plaintiff's mouth be closed in regard to these matters, if Hughes was dead? And if not, why was he not equally competent to prove that, when Hughes tendered the deed for the lot it contained a reservation of the road, and that he refused to accept it, and then Hughes had the reservation erased? The defendants were not claiming a road through "the nine acre lot." Why then was the plaintiff not competent to prove the facts for which he was offered? It is no answer to say that he was not competent because Hughes was dead. The act, allowing parties interested to be witnesses, rendered him a competent witness, unless he is disqualified by the proviso, which declares that the act shall not apply "where the assignor of the thing or contract in action is dead." If, in legal contemplation, Hughes is to be regarded the assignor of the alleged right of way over "the Bricker lot," the plaintiff was not a party to the transaction, nor was he called to testify anything concerning it. Surely the proviso was not intended to exclude parties from being witnesses, where the assignor of the thing or contract in action is dead, if they were not parties to the transaction, and are not called to testify anything that took place between themselves and the deceased assignor. If it was, then no party claiming title through or under a deceased grantor, however remote the conveyance, can be a witness where the land, or some estate in it, is the subject of the action. The proviso must have a reasonable interpretation, and it must not be so construed as to defeat the very purpose of the act. It was intended to exclude parties to the transaction from being witnesses in regard to it, where the opposite party is dead, and his rights have become vested in others by his own act or by operation of law. But it never could have been intended to exclude persons who were not parties to the transaction, and who are not called to testify anything respecting it. The plaintiff was, therefore, a competent witness; but were the facts proposed to be provided *to be proved by him, material and relevant to the issue? If there was a road through the "nine acre lot," and it was changed to its present location

[*Original Edition, pp. 222 and 223.]

between that lot and "the Bricker lot," because the plaintiff would not accept the deed tendered by Hughes reserving the road, what bearing have these facts on the question whether there was a road through the lot conveyed to Bricker called "the old Shirey road," and whether it is the road referred to and intended to be reserved in the deed of Hughes to Bricker? Possibly the offer would have been admissible if it had been proposed to follow it with evidence showing that the road was changed to its present location before the execution and delivery of the deed to Bricker. But this was not a part of the offer, and as both deeds have the same date, the presumption is that it was not the fact. If so, the offer was irrelevant, and the plaintiff has no right to complain of its rejection, though the reason assigned for it may have been erroneous. But there was error in rejecting the deposition of Joshua Bricker "so far as it relates to occurrences between Hughes and Bricker concerning the subject matter in controversy in the suit." If Hughes, the grantor of Bricker, was dead, the latter was not a party to the suit. It is true that the plaintiff claimed title under him, but he had released him from all liability on the covenants in his deed, and therefore Bricker had no interest in the event of the suit. It is clear that he would have been a competent witness as the law stood prior to the passage of the act allowing parties to be witnesses, and it would be an utter perversion of its spirit and meaning to hold that he was disqualified by its provisions. It is an enabling, and not a restraining statute; and the proviso was not intended to apply to a person competent as a witness before the passage of the act, and therefore not within its provisions.

Judgment reversed and a *venire facias de novo* awarded.

Court of Common Pleas, Crawford County.

In re CHARTER OF RED MEN'S MUTUAL RELIEF ASSOCIATION.

1. Under the act of April 29, 1874, the petition and charter of a proposed corporation must conform, both in principle and form, to the directions and provisions of the act.
2. A charter not approved by reason of negligence in these particulars.

Opinion delivered *July*, 1874, by

LOWRIE, P. J.—This document has been presented to me for approval, with the proof that the public notice required by law has been given, and I have perused and examined it, and find it is not in the proper form.

1. The document to be presented for examination is called, in the act of 29th April, 1874, relating to incorporation, "the charter of *intended corporation," and also "the certificate of incorporation;" but in this document it is called by-laws, which word is used in the act of assembly, as it is in common parlance, in a very different and even a contrasted sense. And this error leads to a fundamental error in the last article, which unlawfully assumes and ordains that the association may by its own act alter its charter, miscalled its by-laws.

[*Original Edition, p. 224.]

2. It neglects several directions plainly set forth in section 8d of the act of assembly; in not stating the term of the corporation, nor the names and residences of the subscribers (or members), nor the number of its directors, nor the names and residences of those chosen for the first year; though it seems there must be at least nine who are to be residents of Titusville, and it may possibly be inferred, though it ought not to be left to inference, that these nine are what is called the "local board."

Associations of this kind, usually called beneficial, do not consist of stock subscribers, and I suppose it is so with this one; and hence it cannot give "the number of shares subscribed by each," as required by law; and this duty may be sufficiently complied with by the statement made of the contributions which each member is bound to pay into the common fund.

In requiring the names and residences of the present directors, the law plainly indicates that the application for incorporation is to be made by an existing association already organized, presenting its constitution for legal approval. That constitution must of course be in conformity, both in principle and form, with the act of assembly, and when legally approved and recorded, it becomes the charter of incorporation of the association. It is not intended that any persons who choose may seek such a charter, and that then whosoever will, may organize themselves into an association, and become incorporated under it. And then the public notice of the intended application for a charter, becomes a notice to all the members of the association, and not merely a notice to all strangers who may choose to intervene in the matter.

3. The law requires that the charter shall be subscribed by five or more persons (meaning members, of course), and acknowledged by at least three of them, and this is not done.

If persons, in preparing such papers, would carefully compare their work with the act of assembly, they would save themselves from much trouble and unpleasant disappointment.

The proposed charter is not approved.

* Supreme Court of Pennsylvania.

DERR vs. GREENAWALT.

A will was witnessed by two subscribing witnesses, and a blank was left for the name of the residuary legatee; this was afterwards filled up, but as the subscribing witnesses were not able to testify this fact, *Held*, that, as to the residuary devise, the will was not duly proved.

Error to the Court of Common Pleas of Lebanon County. Opinion delivered July 2, 1874, by

SHARSWOOD, J.—The jury having found in favor of this will and against the defences of mental incapacity, undue influence and fraud, we are relieved from the necessity of considering many of the alleged errors, both in the reception and rejection of evidence, and the answers to the points and the instructions of the charge which relate exclusively to those subjects.

The principle, indeed, the only matter of which, in view of the verdict of the jury, this plaintiff in error has any right to complain, is the binding direction given by the court to the jury under the whole evidence, that the residuary bequest to the plaintiff in error must be rejected as not having been legally proved as a part of the will of the testator.

The will was duly proved to have been executed in the presence of the two subscribing witnesses, but with a blank for the name of the residuary legatee. This blank was afterwards filled, and the question presented is, whether the act of filling up that blank was so proved by two witnesses as to make it in law a part of the will.

There is no difficulty in regard to the rule of law upon the subject. That has been well settled and repeatedly applied in the prior determinations of this court. It was fully considered and discussed in *Carson's Appeal*, 9 P. F. Smith, 493, in which the former cases are cited. That principle is well generalized in the language of Mr. Chief-Justice Gibson in *Hock vs. Hock*, 6 S. & R. 47: "Proof of execution must be made by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence, so that no link in it may depend on the credibility of but one. When the evidence is positive there can be no difficulty, for the witnesses then attest the simple fact of execution itself, but where the evidence of one or both is circumstantial each must make proof complete in itself, so that if the act of assembly were out of the question the case would be well made out by the evidence of either. Circumstantial proof cannot, therefore, be made by two or more witnesses alternating with each other as to the different parts of the aggregate of *circumstances which are to make up the necessary sum of proof; the evidence of each not going to the whole."

The rule is a simple, intelligible one, but the difficulty in this, as it has been in other cases, is in its application. It is not easy for the mind to divest itself of the influence which facts sworn to by one witness have in corroborating the evidence of another, especially of supplying what is a mere *vacuum*—a failure or uncertainty of memory in another. This difficulty is well illustrated by the evidence in this case. The evidence of Mrs. Huber was direct and positive that her son, George Rice, wrote the name in the blank in the presence of the testator and by his express direction. Striking out the entire testimony of Mrs. Huber is there sufficient evidence from other witnesses in the cause which would justify the submission of that fact to the jury? George Rice was unable to testify that he had inserted the name by the direction of the testator or in his presence. "This name," said he, "is my writing. I cannot tell at whose instance I put it in; was done at Greenawalt's or Derr's office. I know I wrote it in; can't say when or who present. If at Derr's office, he present. If at Greenawalt's house, he present. If at his house, my mother present; witnessed a bond; I was called on purpose to witness the bond. I never gave a thought to the other transaction." The only other witness present was Lydia Frantz. She could not recollect having seen George Rice there.

[*Original Edition, p. 226.]

She left after the first execution of the will. "I think I went home to tea." The circumstance of the execution of the bond would, of course, be material, but that it was done at the same time with the writing in the will depends solely upon the credibility of Mrs. Huber. Lydia Frantz does not remember it. What other circumstances then have we in the case? There is undoubtedly evidence of repeated declarations by the testator that Mr. Derr was his residuary legatee, though some evidence was given of declarations to the contrary. It is clear that they go for nothing: *Hock vs. Hock*, 6 B. & R. 47; *Clark vs. Morton*, 5 Rawle, 232. Nor is the circumstance that the will continued four years from its date in the possession of the testator sufficient. Had there been no subscribing witnesses, and the will been proved by the testimony of two witnesses to the handwriting of the testator, it would, perhaps, have been sufficient *prima facie*. The presumption may be that it was perfect when the testator subscribed to it. But the subscribing witnesses were there and must be called, and their testimony showed that the will was not perfect when he executed it. We are thrown back then upon the testimony of Mrs. Huber as to when the blank was filled, and whether by the authority and at the instance of the testator. It might well be that, believing his instructions to have been followed, he had kept the will in his possession without further examination. It does not appear that he ever had the will in his hands after its execution. Even Mrs. Huber fails to prove that, but rather shows the contrary. "After the will *was executed he asked me to take it home with me. I took it home; kept it from December till some time in March; I took it back, gave it to his mother, and she put it in his desk; was found there after his death." Adapting Chief-Justice Gibson's language in *Hock vs. Hock*: "Strike out Mrs. Huber's testimony and how will the case stand? There would be a very material link wanting to connect the testator's declarations with the paper in question. It is said these two witnesses mutually strengthen and support each other. So much the worse. Each must be competent to the whole proof without aid borrowed from the other."

We are of opinion, therefore, that the learned judge below committed no error in the binding direction which he gave to the jury to reject the residuary bequest as no part of the will of L. T. Calvin Greenawalt.

As to the contention that no separate issue was directed as to the fifth item of the will, and the jury was not, therefore, empowered to find that to be no part of the will, as perhaps may be inferred from *Hocksworth vs. Miller*, 7 Barr, 458, it is sufficient to observe that no such point was made in the court below, nor has it been specifically assigned for error here.

Judgment affirmed.

[* Original Edition, p. 227.]

Supreme Court of Pennsylvania.

BIGONY vs. TYSON.

A bond in \$2,000 conditioned that Dr. B. shall not practice medicine in a certain locality, is not to be considered as liquidated damages.

Error to the Common Pleas of Montgomery County. Opinion delivered *January 26, 1874*, by

GORDON, J.—In *Burr vs. Todd*, 5 W'r. 206, it was held that a bond in the sum of two thousand dollars, with a condition that the obligor execute and deliver deeds for certain lands therein described, was a penalty conditioned for the conveyance of the title, and not a liquidation of damages for a breach of condition. The bond in the case in hand is similar in its character to that above recited, the difference between the two being found only in the condition. In the one case it is for the conveyance of title, in the other, that Dr. Bigony shall not practice medicine within five miles of the village of Skippackville. Obviously, this difference cannot of itself affect the legal construction of the bond, but one rule must govern both, unless circumstances outside of the bond control that rule.

Justice Woodward, in delivering the opinion in the case above cited, says: "It is impossible to regard it as liquidated damages for breach of condition. There is not a word in it to import an agreement of the parties to that effect." In like manner do we say of the bond in suit, there is not one word in it which imports an agreement of the parties that it should operate as a liquidation of damages for a breach of its condition.

Viewing it, then, from a legal standpoint, as did the judge below, when he instructed the jury "that the sum designated in the bond is to be deemed and treated as liquidated damages, and not a penalty," we can come to no other than a conclusion contrary to that at which he arrived, and say, this is none other than a penalty designed to cover any damages the plaintiff might suffer by the defendant's breach of the bond in practicing within the prescribed limits. Any other interpretation would overthrow a well settled rule of law, established by a multitude of decisions.

It is not to be understood, however, that we intend to infringe upon a rule just as well established as that above stated, that is, that the intention of the parties gathered after the written instrument, may control the technical rule as found upon the face of that instrument, and thus fix the sum therein mentioned as stipulated damages.

But in the case in hand the facts and circumstances, which might have thus altered the rule, rested wholly in parol, and therefore should have been submitted to the jury.

A controlling circumstance would be the actual consideration of the bond, for this might go far to let us into the intentions of the parties to it. There is no consideration, whatever, set out upon the face of the obligation, excepting that imported by the seal, and this

being but technical, it can help us to no construction beyond that arising from the face of the instrument.

And the jury found, what the court takes for granted, that the plaintiff, being a young physician, and hence having in view the serious difficulties he must encounter from the competition of an older one long settled in the place, paid the defendant eleven hundred dollars, or any other valuable consideration for the good will of his practice, and that thereupon the bond in suit was executed, it might well have been inferred that the sum therein mentioned, was intended as stipulated damages upon a breach thereof. And this, the more so, in view of the difficulty of ascertaining with any degree of accuracy the actual damages resulting from the interference and competition of the defendant.

But these important and controlling facts are disputed by the defendant. Indeed, if he is to be believed, he executed the bond without consideration; as a mere gratuity.

It is obvious, then, that this dispute, involving, as it does, the character of the obligation in controversy, can be settled only by a jury, and hence the court erred in charging as a matter of law, that the sum designated in the bond was to be deemed and treated as liquidated damages.

Judgment reversed, and *venire facias de novo* awarded.

***Supreme Court of Pennsylvania.**

In re ESTATE OF SARAH PETERMAN, *Deceased.*

An assignor for benefit of creditors, reserving the benefit of the exemption act, is entitled to select out of what property he pleases. The appraisers of the assigned estate must appraise what he retains. It is not laches for him to wait until the sale of realty in which he had an undivided interest, and then claim his exemption out of its proceeds.

Appeal of Lewis Peterman from the decree of the Orphans' Court of York County in the matter of the distribution, etc., real estate of Sarah Peterman, deceased. Opinion delivered July 2, 1874, by

WILLIAMS, J.—This was a proceeding in the Orphans' Court for the distribution of the fund arising from the sale of the real estate of Sarah Peterman, deceased. The sale was made by a trustee under an order of the court, in proceedings in partition, and, upon the settlement and confirmation of his account an auditor was appointed to distribute the balance of the money in his hands. The appellant, Lewis Peterman, was entitled, as son and heir at law of the decedent, to the one undivided sixth part of the estate of which she died seized. But before the sale by the trustee, he made a voluntary assignment, for the benefit of his creditors, of all his real and personal estate, "except, however, so much as may be exempted by the laws of this commonwealth from levy and sale on execution and distress for rent, to be selected by the said Lewis Peterman, and appraised for the use of himself and family, according to the law." He selected certain personal property which was appraised

[*Original Edition, p. 229.]

at \$99.88, and set apart for his use. The residue of the estate, with the exception of his interest in the land out of which the fund for the distribution arose, was sold by the assignee and the proceeds distributed among the creditors. On the hearing before the auditor, the appellant claimed that he was entitled to so much of his share of the fund as would with the appraised value of the property which he had elected to retain, amount to the sum of three hundred dollars, but the auditor distributed the whole of his share to the assignee, and the court confirmed his report. Is the appellant then entitled to the portion of the fund he claims? It is clear that he is, unless his right to it was divested by the deed of the assignment. Whether it was or not, depends upon the construction to be given to the exception in the deed. He had the undoubted right to reserve for the use of himself and family, property to the value of three hundred dollars. His right to except it out of the *assignment is founded on the exemption act of April 9, 1849, but this right to it as against the assignee, depends upon the exception of the deed. It is true that the deed does not specify or define the property intended to be excepted, but leaves it to be excepted by the assignor. But his right of selection is not confined to any particular description of property, nor is it subject to any condition whatever; and his right to the property, when selected, is as perfect as if it had been specially excepted out of the assignment. It is to be appraised in order to ascertain and determine its value, and not for the purpose of enabling the assignor to exercise the right of selection. His right to select the amount, to which he is entitled under the exception, out of any part of his estate, does not depend upon its previous appraisement; and if it did, the appraisement is not to be made under the exemption act, as ruled by the court below, but under the provisions of the act relating to assignors for the benefit of creditors, by the appraisers appointed by the Court of Common Pleas to appraise the assigned estate. It is manifest that there can be no appraisement of the property selected by the assignor under the provisions of the exemption act. The appraisement, for which it provides, can only be made by appraisers chosen by the sheriff, constable or other officer charged with the execution of a warrant, or writ for the levy and sale of the debtor's property. But the appraisers of the assigned estate must necessarily fix the value of what the assignor proposes to keep, else they cannot assess what the assignee is to account for: *Mulford vs. Shirk*, 2 Casey, 475. But where the assignor elects to receive the amount to which he is entitled in money no appraisement is necessary. To appraise money is to count, and counting answers all the purpose of appraisement: *Latimer's Appeal*, 12 Casey, 130.

If, then the appellant had the right to elect that, the residue of the amount excepted from the assignment, should be paid him out of the fund for distribution, as he undoubtedly had, and if no demand of an appraisement under the exemption law was necessary in order to enable him to exercise the right, it is clear that he was guilty of no laches in making the election. He claimed that the

[* *Original Edition*, p. 230.]

residue of the amount, to which he was entitled, should be paid out of the fund as soon as he had the right to demand and receive it. He had an undivided interest, as already suggested, in the land out of which it arose. It was not in his possession when he made the assignment, and it was not converted into money by the act of his assignee, but by the order of the Orphans' Court, because partition of it could not be made among the heirs. As soon as his right to the fund attached he asserted his claim to it, and as he had not parted with his right to the amount which he claimed, he was clearly entitled to it as against the assignee. The Orphans' Court was, therefore, in error in not awarding to the appellant the sum of two hundred dollars and twelve cents out of the fund for distribution, and directing the residue of the share in controversy, viz.: the sum of sixty-two dollars and ninety-nine cents, to be paid to the appellee. The decree confirming the auditor's report must be reversed, and the record remitted to the Orphans' Court, with instructions to enter a decree in conformity with this opinion. The costs of this appeal to be paid by the appellee out of the portion of the fund decreed to him.

Decree accordingly.

Court of Common Pleas, Schuylkill County.

WM. SAYLOR vs. R. R. MORRIS.

A judgment by default on an appealed case not taken in accordance with the rule in such cases is of no validity and will be set aside.

Rule to show cause why judgment should not be stricken off. Opinion delivered August 31, 1873, by

PERSHING, P. J.—The plaintiff in this case obtained a judgment against the defendant before a justice of the peace. The defendant appealed the case into court, but, having neglected to file his affidavit of defence, judgment was taken against him by default. By the written directions of plaintiff's attorney the damages were assessed by the prothonotary at the amount of the copy of the book account filed by the plaintiff. The 49th rule of court, which regulates the taking of judgments on appeals for want of an affidavit of defence, provides that "the plaintiff, having filed a declaration, or statement, and copy of his claim, within the first week of the term, shall be entitled to a judgment for the amount of the judgment of the justice, with interest, and with costs," etc. The judgment in this case was not taken for an amount ascertained, viz.: the judgment of the justice, but for an amount to be ascertained by an assessment of damages. This was following the practice under the 47th rule of court, which is applicable alone to suits originally instituted in the court and is authorized by the special act of assembly, passed April 14, 1851. The whole proceeding in this case ignores the judgment of the justice and is outside of the only rule (49th) which could give a judgment of this court validity when taken by default on the transcript of the justice of the peace.

Whether, as suggested, in the absence of a statute authorizing it,

[*Original Edition, p. 231.]

judgment can be taken under the 49th rule of court, by default, in such cases as the one now before us, it is not necessary for us to decide. The rule is a fair one, and we are disposed to uphold it, but we will not stretch it beyond its proper limits so as to make it embrace cases which are not fairly and plainly within it. We will refer the controversy between the parties in this case for settlement to a jury.

And now, August 31, 1874, the judgment in this case stricken off the record, and the proceedings under it set aside at the costs of the plaintiff.

***Court of Quarter Sessions, Cumberland County.**

COMMONWEALTH vs. JANE LINDSEY.

A married woman cannot be convicted for selling liquor without license where the same is done in the presence of her husband.

The husband would be coercively present if in the house, though not in the room where the selling was going on.

Indictment for selling liquor without license. Opinion by

JUNKIN, P. J.—The evidence shows that this defendant is a married woman, and was at the time she sold the liquor. Her husband and she lived in the same house, and the saloon where the selling was done was in that house. He had been carrying on the business and making the sales until a warrant for his arrest issued, when he disappeared, and his wife alone and without his presence in the room conducted the business. The husband was concealed, or at least confined himself to the house and premises. We are asked to say to you that this defendant cannot be convicted, because the law presumes that she committed the offence by the coercion of the husband.

Undoubtedly when the wife is guilty of a criminal act in the presence of her husband, the law presumes that he compels her to do it, but it is just as true that when she commits a crime in the absence of her husband, the law presumes that she did it voluntarily, and she is answerable: *Commonwealth vs. Butler*, 1 Allen, 4; Bishop's C. L. § 452; Wh.'s C. L. § 77-78, vol. 3. A wife, in the absence of her husband, though in the house where they live and trade, who sells liquors under such circumstances as would, but for her coverture, prove her a common seller, though indicted as such, is liable, unless it appears that she acted by his command or under his coercion or influence: *Commonwealth vs. Sarah Murphy*, 2 Gray, 510.

But we instruct you that a married woman cannot be punished for the sale of intoxicating liquors, either as principal or as agent of her husband, if he is near enough for her to be under his influence and control, even if not in the same room: *Commonwealth vs. Mary Burk*, 11 Gray, 437.

Then we submit to you this: Was the husband of this woman in and about the house while this selling was done by her, so as to be coercively present though bodily absent, and did he in fact direct

[*Original Edition, p. 282.]

and order the defendant to sell? If you find the fact to be that he was within coercing distance, and did in fact command and compel by the dominion ordinarily exercised by a husband, then acquit; otherwise convict.

***Supreme Court of Pennsylvania.**

APPEAL OF JOSEPH GALLAGHER *et al.*

A bequest of the interest of a certain mortgage for life is a specific legacy and if the specific security is lost the legatee takes nothing.

A widow, electing to take against the will, takes nothing specifically, but under and through the executor.

Appeal from the decree of the Orphans' Court of Juniata County.
Opinion delivered *July 2, 1874*, by

SHARSWOOD, J.—It may be conceded that the bequest to Seth Zeigler of the interest of the Soulouff mortgage during his natural life was a specific and not a demonstrative legacy. In the view which we take of the case it is quite immaterial. The estate was amply sufficient after discharging all legal claims paramount to the will, including the claim of the widow under the intestate laws, to pay all the legacies given in the will, general or specific. It is very clear that the residuary legatees can take nothing until after all these prior claims are discharged. "All the rest and residue of my estate not heretofore bequeathed" is all that they can demand. It appears to have been the idea of the auditor below that a widow claiming her share of the personal property under the intestate law has a title to it specifically, just as she has to her share of the realty. This is a mistake. The election of the widow does not destroy the right of the decedent to make a will and appoint an executor. The entire personal estate, bequeathed or not, vests in the executor in trust for administration and distribution: First to pay debts and other legal claims. The widow electing to refuse to take under the will, has such a claim of which the decedent could not deprive her, as he might deprive his next kin of all claim and give the entire residue to strangers. Over that residue he has entire power—he can carve it out and distribute it as he pleases and in what order he pleases.

His general and specific legacies must first be paid, and then, if there is anything left, it goes to the residue. The widow had no right to the one-half of the Soulouff mortgage specifically. It was the duty of the executor to include that as well as all other assets in the inventory and appraisal. It is true he could not be required to distribute it until it was payable and received. If it was lost from the insufficiency of the security or any other cause, Seth Zeigler would get nothing, and the widow would lose one-half of that item in the inventory and appraisal. As against her, the executor would be bound to collect and distribute it as soon as due; the testator could not postpone it for the term *of Zeigler's life. Nevertheless Zeigler would be entitled to receive the interest of \$2,100 during his natural life. "If the principal be paid in the

[*Original Edition, pp. 233 and 234.]

lifetime of Seth Zeigler I direct the same to be re-invested by my executors to secure the payment of the annual interest to him." It is clear to us that as long as the estate can do so after discharging all debts and paying over to the widow her one full moiety of the balance, Seth Zeigler is entitled by the clear intention of the testator to receive his annuity for life before the residuary legatees receive anything. The title of the widow is under and through the executor just as it would be under and through the administrator if there was no will. She could maintain no action against a stranger for any part of it. We think, therefore, that the learned court below was right in securing the payment of this annuity to Zeigler in preference to the claims of the residuary legatees.

Decree affirmed and appeal dismissed at the costs of the appellants.

Court of Common Pleas, Schuylkill County.

HUMMEL AND WIFE vs. JESSE FOSTER.

Opinion delivered September 7, 1874, by

GREEN, J.—This is a motion to strike off a rule of reference, upon the ground that the arbitrators had no meeting even for purpose of adjournment at the time fixed, and that therefore any subsequent proceedings by them were *ultra vires*. The facts of the case appear to be undisputed.

Upon the day and hour fixed for the meeting, to wit: Friday, the 24th day of July, 1874, at 3 P. M., the attorneys of both parties were present but none of the arbitrators appeared. The defendant's attorney, waiting until 4 P. M., went away, and then one of the arbitrators shortly afterwards appeared, he continued the case until the 31st.

The question arises could any subsequent meeting of the arbitrators or of one of them even for the purpose of adjournment be of any validity without the assent of the parties.

It has been already decided in *Weir vs. Johnson*, 2 S. & R. 459, that "if arbitrators do not meet on the day appointed, their proceeding afterwards is irregular, unless the defendant appear or consent to their proceeding." But the act of assembly requires not only the day of the meeting of the arbitrators to be fixed, but also the hour, and it must follow that if they do not meet at or at least within the hour appointed, their proceedings would be irregular, unless made valid by the appearance or consent of the parties. See Purdon's Dig. Vol. 1, p. 83, pl. 42.

Nor is the exclusive jurisdiction which arbitrators have over a case after it has once been committed to them, infringed upon by the present motion to strike off the rule of reference—for after allowing the time to pass *by without meeting, their jurisdiction ceases, and their right to proceed and determine has come to an end. If the parties do not consent then to proceed, the remedy is to have the rule of reference stricken off by the court, and proceed *de novo*.

Our Rules of Court provide for the striking off of the rule of reference by the prothonotary under such circumstances at the instance

[*Original Edition, p. 235.]

of either party. See Rule 4, page 6. The jurisdiction of the arbitrators has ceased, and that of the court is restored again. Where a question arises whether under the facts of a case the jurisdiction of the arbitrators has determined or whether it still attaches, it is for the court to decide such question. The cases bearing upon this point are *Campbell vs. Bank of Oswego*, 10 Watts, 133, and *Thompson vs. White*, 4 S. & R. 134.

The motion to strike off the rule of reference is made absolute, at the cost of the plaintiff.

Supreme Court of Pennsylvania.

BUCHER vs. THE DILLSBURG AND MECHANICSBURG R. R. Co.

A subscription to stock of a proposed railroad, made upon a blank sheet of paper, which, it was stipulated, should not be binding or be attached to the "heading" (which contained the terms of the association) until the subscriber had inspected and approved of that instrument, is not binding until that assent.

Semble: That there can be no valid subscription to the stock of a company incorporated under act of April 4, 1868, without the payment of ten per cent. by each subscriber.

Error to the Court of Common Pleas of Cumberland County.
Opinion delivered June 4, 1874, by

GORDON, J.—The proposition made by the defendant, to prove that his subscription to the stock of the proposed railroad was made upon a blank sheet of paper, with the distinct arrangement with Brinks, who acted as agent in taking up the subscriptions, that it should not have any binding force or be attached to the "heading", until he had an opportunity of inspecting and approving that instrument, was material, and the court should have admitted it.

The act of April 4, 1868, section 1, under which this railroad company was organized, reads as follows: "Any number of citizens of Pennsylvania, not less than nine, may form a company for the purpose of constructing, maintaining and operating a railroad for public use ; and for that purpose may make and sign articles of association, in which shall be stated the name of the company; the number of years the same is to continue; the place from and to which the road is to be constructed, or maintained and operated; the length of such road as *near as may be, and the name of each county in the State through or into which it is made or intended to be made; the amount of capital stock of the company, which shall not be less than ten thousand dollars for every mile constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist; and the names and places of residence of a president and not less than six nor more than twelve directors of the company, who shall manage its affairs for the first year and until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company," etc.

It will thus be seen that the "heading" about which Brinks and the defendant spoke, was nothing less than the articles of associa-

[*Original Edition, p. 236.]

tion required by the above recited act. It was therefore a matter of grave import to the subscriber that he should know to what his name was to be appended. Moreover, it was doubtless the intention of the legislature that such subscriber should know and carefully consider the paper thus presented for his signature. For these matters involve not merely private rights, but also affect the public weal, and hence the parties to them are required to act with due circumspection and within prescribed lines.

It is therefore certain that, unless Bucher's subscription was attached to the articles of association with his assent for that purpose first had and obtained, it was of no force whatever and could not bind him.

The judgment of the court below is therefore reversed, and a new *verdict* awarded.

We concur in the reversal of the judgment for the reasons given in the foregoing opinion, and we also think that there can be no valid subscription to the stock of a company incorporated under the act of April, 1868, P. L. 62, without the payment by each subscriber of ten per cent. on the amount subscribed, whether the subscription is made before or after the incorporation of the company.

GEORGE SHARSWOOD,
HENRY W. WILLIAMS.

***Court of Common Pleas, Schuylkill County.**

MCHUGH vs. BASHORE *et al.*

The bond of a married woman for purchase money, though constituting a lien upon the land purchased, is invalid as a personal obligation, and execution will be restricted to the land sold.

Quere. Whether a foreign corporation located in another State is subject to an attachment execution?

Rule to restrict the proceedings to the property conveyed to Mary Bashore by plaintiff. Opinion delivered *September 14, 1874*, by WALKER, J.—The following facts have been agreed upon by the parties, to wit:

That the plaintiff on March 1, 1872, executed and delivered to Mary Bashore, wife of David Bashore, a deed for two lots of ground and a building in Mahanoy city for \$6,000, of which \$3,000 were paid in cash and the balance was secured by bond and mortgage on the premises, executed by Mary and David Bashore.

That after this Mary Bashore made certain improvements upon the property, and insured the building in the companies upon which these writs of attachment were served.

That the first instalment of \$1,000 fell due April 1, 1873, and that the building was totally destroyed by fire March 17, 1873.

That the Miss. Ins. Co. and the N. Missouri Ins. Co. are foreign corporations, and that their agent here has no assets of the companies in hand. That judgment was obtained against these defendants for the first instalment, and these proceedings are to collect it out of the insurance fund.

[*Original Edition, p. 237.]

The rule is therefore to restrict the collection of the judgment to the mortgaged premises. Mrs. Bashore being a married woman.

The law is well settled that a confession of judgment by a married woman is void, except to secure the balance of the purchase money; for under the act of 1848, the power to purchase gave her the right to contract for the payment of the purchase money: *Patterson vs. Robinson*, 1 C. 81; *Brunner's Appeal*, 11 Wr. 67; *Caldwell vs. Walters*, 6 H. 79; *Finley's Appeal*, 17 P. F. S. 453; *Steinman vs. Ewing*, 7 Wr. 63.

And her bond is invalid as a personal obligation, though it will constitute a valid lien upon the property: *Ramborger vs. Ingrahm*, 2 Wr. 146, and is absolutely void, though given for debts contracted before marriage, or for necessities for the support of her family: *Keiper vs. Helfricke*, 6 Wr. 325; *Glyde vs. Keistler*, 8 C. 85; *Dorrance vs. Scott*, 3 Wharton, 309.

At law the contracts of a married woman are nullities: *Glidden vs. Strupler*, 2 P. F. S. 400. The plaintiff admits that this is law; but he claims that the insurance fund arising from the destruction of the building sold by plaintiff to Mary Bashore is a substitution of the fund for the property, and *Reed vs. Lukins*, 8 Wr. 200, is cited as sustaining that principle.

Let us examine this view of the case. Mary Bashore effected these insurances upon her own property.

That she had an insurable interest as the owner of the land is unquestionable, and that James McHugh as the mortgagee had likewise an insurable interest in the land (as Chief-Justice Thompson says in *Gravemyer vs. Southern Mutual*, 12 P. F. S. 342), "would be a waste of time to cite authorities to prove."

True, a judgment creditor cannot insure, because he has a general and not a specific lien: *Ruth's Appeal*, 4 P. F. S. 173.

He has neither *ius in re* nor *ad rem*: *Cover vs. Black*, 1 Barr, 495.

The rule of law being that an interest may be insured, not a lien: *Millenberger vs. Beacen*, 9 Barr, 198; *Gravemyer vs. Southern Mut.*, 12 P. F. S. 340; *Norcross vs. Ins. Co.*, 5 Harris, 430; *Wilson vs. Trumbull Mut.*, 7 Harris, 372.

From these authorities there is no doubt that both the plaintiff and the defendant had separate and distinct insurable interests in the property. A part of Mrs. Bashore's interest was converted into money by the fire. If this be true, how can it be said that the money arising from her interest is substituted for McHugh's interest, which was separate and distinct from hers, and which he had failed to have insured. The conclusion strikes us as illogical.

The question has been raised before us as to whether a foreign corporation located in another State can be garnished, or in other words, is a foreign corporation subject to an attachment execution under the provision of the act of the 13th of June, 1836?

Although the proceedings upon an attachment execution are in the nature of an execution as against the principal debtor, they are essentially in the nature of a suit at law or against the garnisher: *Fithian et al. vs. N. Y. & Erie R. R. Co.*, 7 C. 115.

There can be no doubt that a foreign corporation can be sued:

[*Original Edition, p. 238.]

act March 21, 1849, sec. 3, P. S. 216. And service of the writ may be upon the agent: act April 11, 1868, Purdon's Dig. 796, pl. 29. See *Parke vs. Com. Ins. Co.*, 8 Wr. 422, act April 24, 1857, pl. 318, sec. 1, Purdon's Dig. 802, pl. 53. And a writ of foreign attachment may issue against a foreign corporation. Act June 13, 1836, Purdon's Dig. 716, pl. 3: *Bushel vs. Com. Ins. Co.*, 15 S. & R. 173. And a foreign corporation located here may be made garnishee in an attachment execution: *Jones vs. N. Y. & Erie*, 1 Gr. 457, 7 C. 114. But a municipal corporation cannot be made garnishee: act March 20, 1845, P. L. 189, sec. 4, Purdon's Dig. 641, pl. 39, *Erie vs. Knapp*, 5 Casey, 173. See authorities collected in Purdon's Dig. p. 639, in foot notes.

*Judge Sharswood, in the case of *Barron vs. Morrison* (called in a foot note in 2 Troubat & Haly Prac. 826), says, "there is no act of assembly which enables a party to garnishee a foreign corporation in a suit against a third person."

In *Christmas vs. Biddle*, 1 Harris, 223, which was a foreign attachment attaching stock in a bank in Mississippi (though the certificate was held by a broker in this State), Judge Coulter remarks that the attachment process is a proceeding *in rem*, and the matter and thing attached must be in the power and jurisdiction of the court. You might as well, by an ideal and construction service on the *person* of a defendant resident in Mississippi, summon him to appear in our court, or to attach him to compel an appearance by attaching his bank stock in a bank located and established by law in Mississippi. It is also a proceeding *in persona*: *Childs & Co. vs. Digby*, 12 Harris, 23; *Brading vs. Seigworth*, 5 C. 396. It is necessary that the debtor of the defendant should be the garnishee: *Raiguel & Co. vs. McConnell*, 1 Casey, 362. And that the attachment execution should issue from the county where the garnishee resides, otherwise the court, say the sheriff, could not go out of his county to serve him: *Cowden vs. West Branch Bank*, 7 W. & S. 432. See Purdon's Dig. 640, pl. 33.

The agent of these foreign insurance companies, authorized to take applications and receive premiums, closely resembles a ticket agent of a railroad company, and service on such agent of an attachment execution is held insufficient: *Fowler et al. vs. Pittsburg, F. W. & C. R. R. Co.*, 11 C. 22; *Reed vs. Penrose*, 12 C. 214; *Bank vs. Ryon*, 14 P. F. S. 236; *Parke vs. Com. Ins. Co.*, 8 Wr. 422.

However it is immaterial to the merits of the case whether a foreign corporation can be garnished in an attachment execution or not, which involves the construction of the several acts of 1849, P. L. 216, 1857, P. L. 318, and of 1868, P. L. 83, for we are clearly of the opinion that execution on this judgment should be restricted to the property covered by the mortgage, all the liens against the plaintiff having been satisfied.

Rule made absolute.

[*Original Edition, p. 239.]

Supreme Court of Pennsylvania.

COLUMBIA INS. CO. vs. MASONHEIMER.

The secretary of an insurance company is the organ of communication with policy holders, and has authority to inform a holder of the cancellation of his policy, on such cancellation there can be no recovery of assessment on premium rate. The language of the secretary in this case construed to be a notification of cancellation.

Error to the Court of Common Pleas of Cumberland County.
Opinion delivered July 2, 1874, by

WILLIAMS, J.—The secretary was the proper organ of communication between the company and the defendant as the assignee and holder *of one of its policies, and it was clearly within the scope of his authority to inform the defendant of its cancellation for the failure of the assignor to comply with the condition upon which it was issued, and for the non-performance of which the company had reserved the right to cancel it. If the policy was in fact cancelled, there can be no recovery of the assessments on the premium note given by the defendant. It was wholly without consideration if the contract of insurance was rescinded, after the assignment of the policy, for the non-payment of a previous assessment by the assignor. No question is made in regard to the right of the company to cancel the policy, but it is contended that it was not in fact cancelled, and that the letter of the secretary, taken in its broadest sense, does not declare that the company had cancelled the policy, but only that they had power to do it if they chose to exercise it. There can be no doubt, as already suggested, that the letter of the secretary was within the scope of his official authority, and that it is binding on the company, whether they expressly authorized it or not. The only question then is, whether it admits of the construction put upon it by the defendant. It is true that he does not assert in express terms that the company have cancelled the policy for the non-payment of the assessment, but is not this the obvious meaning and import of its language? If it was not intended that the defendant should understand that the policy was cancelled, why was he informed "that the company cancelled all policies on which the assessment is not paid in thirty days after the same is called for?" And why was he told: "If you have paid the agent you are all right. If not, the company will renew the policy when it is paid?" What is the meaning of this language if it was not intended to convey the impression that the policy was cancelled? That the defendant so understood it is shown by his acts. He returned the policy to the assignor, obtained other insurance, and informed the company of the fact. If the company did not mean to be understood as having cancelled the policy, why did they not undeceive him? They do not deny but tacitly admit that they received his letter. Why then should they not be treated as having acquiesced in the construction which he put on the secretary's communication? If he misapprehended its meaning it was their duty to inform him of his mistake. But it is evident from the

[*Original Edition, p. 240.]

whole tenor of the letter that he understood it just as it was intended he should. If so, the letter was rightly admitted in evidence, and the case was submitted to the jury with as favorable instructions as the company had any right to ask. Judgment affirmed.

***Court of Common Pleas, Schuylkill County.**

GASS vs. THE SCHUYLKILL IRON CO.

Appearance is a waiver of notice to appear in an application for a stay of execution. In calculating the thirty days allowed by law to enter bail for a stay, the day on which judgment is entered is excluded.

Application for a stay of execution. Opinion delivered by

WALKER, J.—On June 29, 1874, judgments were taken against the defendant in both these cases, and on July 29, 1874, the parties by their counsel, appeared before me at chambers, and the defendant offered Jno. Beury as bail for a stay of execution. The 31st rule of court requires twenty-four hours notice to the opposite party in an application for a stay of execution of the person to be offered and of the time and place. This was not given until a few hours before the meeting, but the counsel of all the parties appeared at the time and place named, and the bail was offered and objected to by plaintiff for the following reasons, to wit:

1. That the motion was not given in accordance with the rule of court.
2. That the bail was not entered within the thirty days required by act of assembly.

As to the first objection the plaintiffs say that they appear by their counsel only for the purpose of objecting to the entry of the bail.

The only object of the rule of court is to give sufficient notice to the plaintiff of the approval of the bail to enable him to object to its entry either on the ground of insufficiency, or for any other legal reason. The act of assembly confers the right, and is a privilege (12 S. & R. 416) and the rule of court prescribes the time.

The counsel having appeared at the time and place mentioned in the notice, their objection that they had not twenty-four hours notice is immaterial, and is cured by their appearance and a waiver of the time: *Stroup vs. McClure*, 4 Y. 523; *Shrober vs. Mather*, 13 Wr. 21; *Zion's Church vs. St. Peter's*, 5 W. & S. 215; *Hatch vs. Stett*, 16 P. F. S. 264; *Minersville Road Case*, 1 Foster, 6.

To sustain the objection it is urged that the act of June 16, 1836, relative to execution (Purdon's Dig. 634, pl. 5) requires bail to be given and approved during thirty days, and that a stay of execution being a privilege in derogation of the common law rights of the plaintiff, that act must be construed strictly, and also in computing the time, the day on which the judgment is entered (to wit, the 29th of June) must be included, and the case of the *Erie Bank vs. Compton*, 3 C. 195, is relied on as determining this point. But I am of the opinion, that only decides, that bail entered thirty-two days

[*Original Edition, pp. 241 and 242.]

after judgment is not within the prescribed time. The only question is should the day on which the judgment is entered be included in the thirty days?

Judge Porter in *Cromlien vs. Brenk*, 5 C. 525, when speaking of the two years given to redeem land sold for taxes, reviews the whole question of time mentioned in the statutes, and says: "If the day of redemption were fixed at one day after the day of sale, that day could not be the day of the sale, for it might be made at the last moment of the day, and the owner being thus prevented from tendering on that day would lose his right; the time mentioned must therefore be the following day, so of one year and of two years."

See the numerous authorities collected by his honor in the case referred to. In addition to this I am informed that the practice in this county has been in accordance with this view. I therefore think that the defendant has brought himself within the provisions of the act, and the bail offered being sufficient it is therefore approved.

Supreme Court of Pennsylvania.

REESER vs. JOHNSON.

1. A plaintiff will not be restrained from selling an alleged interest in real estate, of his judgment debtor, unless the want of such interest is clear and manifest. The determination of title will be left to an ejectment.
2. In this case the invalidity of plaintiff's lien by reason of defendant's adjudicated bankruptcy, was not sufficiently clear to justify an order restraining execution.

Error to the Court of Common Pleas of Cumberland County.
Opinion delivered July 2, 1874, by

MERCUR, J.—The validity of the judgment against the defendant, is unquestioned. It was regularly obtained by adverse proceedings, before any action in bankruptcy was commenced against the defendant. The plaintiff claims it to be lien on certain real estate, formerly owned by the defendant and seeks to sell the same by virtue of execution issued on this judgment.

The assignee in bankruptcy, of the defendant, denies the existence of the lien. On application of the assignee, the court enjoined the plaintiff against selling the real estate conveyed by said assignee to Jacob Coover.

The general rule unquestionably is to permit a sale of any alleged interest in land, of the defendant in the judgment. If the defendant has no interest in the land, no title passes. The question of title is usually left to be determined in action of ejectment: *Hunter's Appeal*, 4 Wright, 194. It is true this case recognizes the right of the court to enjoin against a sale of the real estate of the wife on an execution against her husband. It was supported on the express language of the statute absolutely prohibiting the property of a married woman from levy and sale, for the debts and liabilities of her husband, and the unquestioned fact that the land was the exclusive property of the wife. It was there said, a clear case of title in the wife must be shown, "otherwise a court of equity will not interfere, but leave the creditor to pursue his process, and the purchaser at the sale to establish his title in ejectment."

It must be conceded, if the assignee in bankruptcy rests his right on the proceedings in bankruptcy alone, he is not entitled to the order he has procured. The award in favor of the plaintiff was obtained several days before proceedings in bankruptcy was commenced against the defendant: *Rohrer's Appeal*, 12 P. F. Smith, 498; *Fehley vs. Barr*, 16 Id. 196; *Keller vs. Denmead et al.*, 18 Id. 449. He therefore seeks to fortify his position by invoking the aid of the voluntary assignment previously made by the defendant in the judgment, for the benefit of his creditors under the laws of this State. It appears, however, that one of the acts of bankruptcy charged in the petition, filed against the defendant with the execution of that very assignment, and he was declared a bankrupt by general adjudication.

Upon bill in equity subsequently filed in the Circuit Court of the United States, by the petitioning creditor, and by the assignee in bankruptcy, against the assignees under State law, it was adjudged and decreed that said voluntary assignment was null and void, providing, however, that all acts theretofore duly performed by the assignees under the assignment for the benefit of the creditors be deemed valid and effectual, on their duly accounting to the assignee in bankruptcy for what they had received, and that they surrender and deliver over to him all the remaining estates and effects. It was further ordered, that from and after said decree they desisted from acting therein further than directed thereby.

This decree of the Circuit Court may be held sufficient to notify the previous acts of the assignees under the laws of this State, and to prohibit their further action. Its binding force may extend to all persons and things brought within the jurisdiction of that court. The plaintiff in this case, however, was not a party to those proceedings. No question was there considered as to the lien of his judgment, nor as to his rights as creditor of the bankrupt. He never presented or proved his claim before the register in bankruptcy. He in no manner took part in any of the proceedings in bankruptcy. He rested upon his judgment and relied upon the lien which he claims to have thereby acquired.

Without giving any opinion as to the validity of the lien, claimed by the plaintiff, we feel constrained to say, that its invalidity is not so clear as to justify the order made by the court below. The plaintiff should be at liberty to proceed and sell, and the purchaser to try his title by ejectment.

Order reversed.

***Supreme Court of Pennsylvania.**

TRIMBATH AND WIFE vs. PATTERSON *et al.*

1. The jurisdiction of the magistrate should be affirmatively shown by the record in a proceeding to obtain possession of the premises for nonpayment of rent.
2. The amount of the rent due and in arrear should always be endorsed on the writ of possession.

Error to the Court of Common Pleas of Blair County. Opinion delivered July 2, 1874, by

WILLIAMS, J.—The main question in this case was decided in
[*Original Edition, p. 244.]

McDermott vs. McIlvain, reported in the Legal Gazette, Vol. VI., No. 22, 175. It was there ruled, for reasons which need not be repeated, that it is essential to the validity of proceedings under the landlord and tenant act of April 3, 1830, P. L. 187, to obtain possession of demised premises for the non-payment of rent, that the jurisdiction of the magistrate should be affirmatively shown by the record. The act does not authorize proceedings against a tenant for life or in fee under a deed of perpetual lease, but the jurisdiction which it confers is limited to the case of a demise for years or for a less period, and, therefore, it is a fatal defect if the record does not show the term for which the premises were demised. In the case before us the record does not show that the complainants, or any one under whom they claim title, demised the premises to Mrs. Trimbath, nor does it show that they were demised to her for a term of years or a less period, and, consequently, there is nothing on the face of the record showing that the magistrate had jurisdiction of the proceedings.

The omission to ascertain and determine the amount of rent actually due and in arrear, and endorse the same on the writ of possession, was clearly an error.

The act requires this to be done in order that the tenant may, if he sees fit, supercede the writ by paying to the constable, for the use of the lessor, the amount of the rent together with the costs of the proceeding. And it was a flagrant error, though not assigned as such, to issue a writ of possession, on the day the judgment was entered, in face of the provision that no writ of possession shall be issued for five days after the rendition of judgment. There is nothing of substance in the other assignments that call for special notice or discussion. The want of jurisdiction is fatal to the whole proceeding, and, if the demise was in fact for a term of years, the defect in the record is irremediable.

The judgment of the court below is reversed, and the proceedings of the justice of the peace are set aside at the costs of the complainants, the defendants in error.

*Supreme Court of Pennsylvania.

WARFEL vs. FRANTZ AND WIFE.

If a surety signs and delivers his bond on the express condition that his co-sureties should sign it, unless such condition is complied with, it cannot be enforced. Express assent to such condition by the obligee is not necessary.

Error to the Court of Common Pleas of Lancaster County. Opinion delivered July 2, 1874, by

WILLIAMS, J.—The verdict of the jury establishes the fact that the defendant was not induced to sign the bond by false representations or misstatements of the plaintiff's husband and agent. He was, therefore, liable as surety for the amount of the bond, though it was not signed by one of the co-sureties named therein, unless its delivery was conditional, and only to become absolute upon obtaining his signature. Its possession by the plaintiff was *prima facie* evidence of actual delivery, and the burden of showing that

[*Original Edition, p. 245.]

it was delivered as an escrow, was on the defendant. Whether its delivery was absolute, or conditional, was a question of fact for the determination of the jury, and if it was submitted to them with proper instructions the judgments must be affirmed; otherwise it must be reversed. The court charged the jury "that the plaintiff is entitled to recover the amount due on this obligation from Warfel, the defendant in this action, unless you find, from all the evidence in the cause, that . . . Warfel, when he executed the bond and handed it to Frantz, expressly stipulated that Frantz should not deliver the bond to Mrs. Frantz, to whom it is made payable, until the names of Christian Scheetz and Henry Scheetz were obtained to it, and Mr. Frantz so promised; in such case, until the condition was performed, there could be no legal delivery, and it would not be the bond of Warfel." And in answer to the defendant's sixth point the court said: "The handing of the bond, after signing it, by Warfel to Frantz, completed its delivery, and in the absence of fraud on the part of Frantz in obtaining it, or an express stipulation on the part of Warfel assented to by Frantz, that it should not be given to Mary Ann Frantz, to whom it was made payable, until the names of Christian and Henry Scheetz were signed to it, made the contract expressed in the bond perfect in reference to Warfel, the defendant, and it may be enforced against him."

Undoubtedly it was not an absolute, but a conditional delivery of the bond, if Warfel, when he handed it to Frantz, expressly stipulated, and Frantz promised, that it should not be delivered to his wife until the names of Christian and Henry Scheetz were obtained to it. But what if Frantz made no such promise? Was there then a good and valid delivery of the bond? If the defendant signed and handed it to Frantz upon the express condition that it was not to be delivered to his wife until the names of Christian and Henry Scheetz were obtained to it as co-sureties, then Frantz had no right to treat it as an absolute delivery, whether he expressly assented to the condition or not. It did not require the assent in order to make such a delivery conditional; and if it did, his assent would be implied from his acceptance of the bond. The defendant was under no obligation to sign as surety. It was a voluntary act on his part, and he had the undoubted right to insist, as a condition precedent to its actual delivery, that it should be signed by Christian and Henry Scheetz as co-sureties; and if he did, no liability would arise until the condition was complied with. But the jury may have inferred from the instructions of the court that such a condition would not have been binding unless it was expressly assented to by Frantz, and in this aspect of the case, both the charge and the answer to the defendant's sixth point had a direct tendency to mislead them. The court should have affirmed the point without qualification, and instructed the jury in accordance therewith that if the defendant handed the bond to the plaintiff's husband with the understanding that he should procure to it the names of Christian and Henry Scheetz, it was only a conditional delivery, and unless such condition was complied with, its payment cannot be enforced.

[*Original Edition, p. 246.]

The other assignments are not sustained, and there is nothing in them that calls for discussion.

Judgment reversed and a *venire facias de novo* awarded.

Court of Common Pleas, Schuylkill County.

HUGHES vs. GALLANS.

The contracts of an infant at common law cannot be enforced except for necessities. When the infant represents himself of age, and thus obtains the credit, he becomes liable in an action on the case for damages.

Motion for a new trial. Opinion delivered February 16, 1874, by WALKER, J.—The evidence in this case was that the defendant employed Patrick Christopher Hughes, a small boy, to drive horses for him attached to his boat on the Schuylkill Navigation Canal, during the summer of 1871. The wages of the boy the defendant refused to pay, and suit was therefore brought by his next friend, James Hughes.

It appeared on the trial that Thomas Gallans, the defendant, was also a minor under the age of 21 years, and this was the ground of the defence, *the contract not being for necessities furnished. The court, upon the request of the defendant, instructed the jury that if the defendant was a minor at the time the contract was made and the services were performed, the plaintiff could not recover.

Was there error in this?

No doubt this is a case of hardship, but the hardship of special cases has, it is said, run away with the law, and it has been found a dangerous expedient to fritter away a principle to sustain an exception.

The contracts of an infant at common law cannot be enforced except for necessities: 1 Blackstone Com. 466, and notes by Judge Sharswood; *Curtin vs. Patton*, 11 S. & R. 305; *Clemson vs. Bush*, 3 Binney, 413; *Penrose vs. Curren*, 3 Rawle, 351; *Sliver vs. Shelback*, 1 Dallas, 165; *Brown vs. McCune*, 5 Sanford, 228; 1 vol. American Leading Cases, 307; 2 vol. Smith's Leading Cases, 653, 5th American ed.; *Norris vs. Vance*, 3 Richardson, 164; *Conroe vs. Birdsall*, 1 Johns. 127; *McGinn vs. Shaeffer*, 7 Watts, 412.

And this is so, even though he represented himself to be of age: *Burley vs. Russel*, 10 New Hamp. 184; *West vs. Moore*, 14 Vermont, 447; 1 Blackstone Com. 466. See Adams' Equity, 362 and notes.

Legal incapacity cannot be removed by fraudulent misrepresentation, nor can there be an estoppel involved in the act to which the incapacity relates: *Keen vs. Coleman*, 3 Wr. 299.

Infants are liable for their torts: *Bullock vs. Babcock*, 3 Wend. 391; *Vasse vs. Smith*, 6 Cranch, 226. But not when the contract is stated as an incident of a supposed tort: *Will vs. Welsh*, 6 Watts, 9; *Keen vs. Hartman et ux.*, 12 Wr. 497.

Infants are liable for necessities: *Rundel vs. Keeler*, 7 Watts, 237; *Com. vs. Hantz*, 2 Pa. Rep. 333; 1 American Leading Cases, 300 to 308, and notes.

The term necessities is a relative one, and what are necessities

[*Original Edition, p. 247.]

must be determined by the age, fortune, condition and rank in life of the infant: 1 Black. Com. 466 and note 14 (Sharswood's ed.)

Moneys loaned for repairs are not necessities: *West vs. Gregg*, 1 Grant, 53. And there may be no recovery for necessities when the infant has a guardian: *Guthrie vs. Murphy*, 4 Watts, 80; *Walling vs. Toll*, 9 Johns. 141; *Angel vs. McLellen*, 16 Mass. 28.

And in an over supply a tradesman acts at his peril: *Johnson vs. Lines*, 6 W. & S. 80.

Whether the person be a minor or not is a question for the jury: 1 Black. Com. 466, and notes; 1 M. & S. 738.

And in doubtful cases it is better to admit the evidence and judge of its effect afterwards: *Allen vs. McMaster*, 3 Watts, 181.

Though an infant, therefore, be not liable for his contract, he is nevertheless answerable in an action on the case for damages: *Fitts vs. Hall*, 9 New Hamp. 441; *Wallace vs. Morris*, 5 Hill, 391.

The rule is therefore discharged.

*Supreme Court of Pennsylvania.

FRY'S APPEAL.

Where the funds arising from a sheriff's sale are insufficient to pay liens prior to a judgment, it is error to apply any of the fund in payment of the costs on such judgment arising prior to the issuing of the *fi. fa.*

Appeal from the Common Pleas of Lancaster County. Opinion delivered May 26, 1874, by

MERCUR, J.—In the distribution of money raised by the sheriff's sale of real estate the costs of sale should first be paid and the residue of the fund be applied on the liens, divested by the sale, according to their priority. The costs thus preferred do not include those made in obtaining the judgment, but commence with the issuing of the execution necessary to effect the sale. In this case the fund was insufficient to pay the liens which were prior to the judgment in favor of Groff, on which the sale was made. It was, therefore, error to apply any of the fund in payment of the costs of his judgment made prior to the issuing of the *fi. fa.* In decreeing the costs of subsequent judgments to be paid the error is equally manifest. The learned judge appears to have thought, inasmuch as these costs were officers' fees, and the sheriff had collected a fund by a sale of the property of the defendant in judgments, therefore those fees were collected and the money was held in trust for the officers entitled to receive it. The fallacy of this reasoning is in assuming that those fees form a part, and the sale was not made on process issued on either of them, no part of those judgments were collected. Hence the money could not be held in trust for the officers who were entitled to those fees. The fees for all purposes of the distribution of this fund stood upon no higher ground than other parts of the judgments to which they were attached.

Decree reversed, and now it is ordered that the record be remitted, with instructions to decree a distribution conformably to this opinion, and that the costs of this appeal be paid by the appellees.

[*Original Edition, p. 248.]

***Court of Common Pleas, Columbia County.**

THE LOCUST MOUNTAIN COAL AND IRON COMPANY *vs.* JOHN CURRAN *et al.*, School Directors, AND MARTIN PURCELL, Collector of Taxes of Conyngham Township School District.

In a proceeding by bill in equity to restrain the collection of school taxes, the court will not inquire into the validity of the appointment of the collector, he having given bond with sureties approved as required by law.

The act of May 8, 1854, did not establish a fixed rate of taxation for school purposes. It merely provided a standard by which the maximum rate could be ascertained at the time the tax is levied, to wit: the amount of both State and county taxes authorized by law.

The act of February 23, 1866, exempting real estate from the three mill tax for State purposes operated as a reduction of a like amount on that species of property for school purposes.

A levy of thirteen mills on real estate is three mills in excess of what the law allows. The collection of such excess may be restrained by injunction.

In equity. Motion for a preliminary injunction. Opinion filed September 29, 1874, by

ELWELL, P. J.—The plaintiff's bill alleges that Martin Purcell, being one of the school directors of Conyngham township, was appointed collector of the school taxes and also that the school directors of that district have levied a tax of thirteen mills on the dollar of the adjusted valuation of their real estate which the defendants are proceeding to collect. It is complained that Martin Purcell was improperly appointed collector and that the tax above ten mills on the dollar is illegal. It appears by the answer of the defendants that Martin Purcell, being one of the school directors, was duly elected treasurer of the board and that no person offering to take the office of collector, he was appointed thereto and gave bonds approved, as required by law, for the due performance of the duties of the respective offices. The plaintiff now moves for preliminary injunction to restrain the collection of any part of said tax by Martin Purcell as collector and to prevent the collection of three mills, part of the said tax, by the hand of any person.

The first ground upon which the injunction is asked is untenable. The collector is at all events an officer *de facto*, the validity of whose appointment cannot be inquired into in this collateral proceeding. And if it could, we would not put forth the strong arm of the law to stay the collection of school taxes unless we were satisfied that irreparable loss would be sustained by the taxpayers of the district unless we did. Nothing of the kind is alleged, and for that reason alone we would refuse the injunction to restrain the collection of the tax generally. In another case, No. 296, September Term, 1874, a *quo warranto* against Martin Purcell to show by what authority he exercises the duties of the office of collector of school taxes of Conyngham school district, in an opinion just filed, we held, for reasons given, that he was duly appointed to the office and gave judgment in his favor. That judgment is conclusive of his right while it stands unreversed upon the record.

But the directors went beyond their authority when they levied

[*Original Edition, pp. 249 and 250.]

a tax of more than ten mills on the last adjusted valuation of the real estate in their district. At the time of levying this tax the rate per cent. for county taxes was limited by law to ten mills on a dollar. Taxation is regulated wholly by statutes. Both the subjects for taxation and the amount of tax authorized can be ascertained only by reference to acts of assembly. In order that school directors might be provided a ready and convenient guide, both as to subjects of taxation, their values and the amount of tax which they are authorized to levy, the legislature passed the act of May, 1854, the 29th section of which requires the commissioners of the county to furnish them with a correct copy of the last adjusted valuation of proper subjects and things made taxable for State or county purposes, which subjects and things are made taxable for school purposes. Having thus ascertained the objects of taxation, the next section regulates the amount of tax thereon. Not by any specified rate per cent., but by a maximum, to be ascertained by reference to other laws upon the subject. The 30th section of the act provides that "the board of directors shall, on or before the first Monday in June, annually proceed to levy and apportion the said school tax, pursuant to this act, not exceeding the amount of State and county taxes authorized by law to be assessed on all objects, persons and property, made or to be made taxable for State or county purposes."

The amount is not to exceed that authorized by law for State and county purposes. Authorized when? at the time of passing the act or at the time of levying the tax? If the former was intended, the lawmakers could scarcely have omitted the word "now" and thus establish a fixed rule not to be varied by subsequent legislation in regard to State or county tax. I submit that the amount of tax which could be levied was to be ascertained by the standard furnished by the act of 1854, which was and is the amount authorized by the law at the time of levying the tax and not at the date of the enactment.

The act of April 8, 1846, forbids the granting of injunctions by the courts against the erection of any public works "erected or in progress" under the authority of an act of the legislature, until the questions of title and damages were decided, held that the "works erected or in progress" referred to were not limited to the date of the enactment, but that the law applied to the time when resort was had to a court of equity: *Wolbert vs. The City of Philadelphia*, 12 Wright, 439. The rules of construction there applied are applicable to the act of 1854. The directors are required annually to levy a tax, and the law in force at the time as to the amount is the authority under which they act.

In 1854 the law imposed a tax of three mills on a dollar of the valuation of real estate for State purposes, and ten mills for county purposes. But on the 23d of February, 1866, P. L. 83, an act was passed exempting real estate from all taxation for State purposes. From that time to the present the amount authorized by law to be levied upon real estate for either State or county purposes or both is limited to ten mills on a dollar of the valuation.

[*Original Edition, p. 251.]

I am unable to concur in the views expressed by the superintendent of common schools on this subject. He declares it to have been the "obvious intention of the law to fix the amount of tax at thirteen mills on the dollar, and thus avoid the perplexing changes that would otherwise cripple the financial managements of school affairs." School decisions 1873, page 74. With all due respect to the opinion of the superintendent, I am compelled to differ with him, and to hold, that the manifest and plain intent of the act was to allow to be imposed each year for school purposes, as much as the law allowed for both State and county purposes.

I hold, too, that if the legislature should add to the list of things made taxable, some things not taxable for State or county purposes in 1854, such subjects would at once become taxable for school purposes. And if the rate per cent. were increased from what it was in 1854 for State purposes the increase for school purposes according to the express language of the act might be equal to the amount thus increased. If this be so, and it is too clear to be doubted, it follows with equal reason, that when subjects of taxation are reduced in number, or the tax made less for State and county purposes, the amount of school tax undergoes a like reduction.

Since the act of 1866 the amount of tax on real estate is limited by law to ten mills on a dollar for State and county purposes—there being no State tax and the limit for county being that amount. In adopting thirteen mills as the rate per cent. in taxing real estate the school directors exceeded their authority, and to the extent of that excess may be enjoined: *Shirk vs. Bucher*, 3 P. F. Smith, 94.

In *Gorrell vs. Murphy*, 1 Legal Gazette Rep. 495, we refused to enjoin the collector, holding that although irregularly assessed the tax levied in that case was not illegal. In the argument we went further than was necessary, but the point decided was not in conflict with what we now hold.

*And now, September 29, 1874, the motion for a preliminary injunction came on to be heard and was argued by counsel, and upon due consideration thereof it is ordered that a preliminary injunction be issued to restrain the defendants from the collection of more than ten mills on the dollar of the last adjusted valuation of the real estate of the plaintiff in Conyngham township. Before the writ goes out the plaintiff is required to give bond in the sum of three hundred dollars as required by law with surety to be approved by me.

Supreme Court of Pennsylvania.

MISHLER vs. REED AND HENDERSON.

Bona fide purchaser of negotiable paper for value cannot be affected by private understandings between third parties.

Error to the Court of Common Pleas of Lancaster County. Opinion delivered May 18, 1874, by

[*Original Edition, p. 252.]

AGNEW, C. J.—The offer, the rejection of which is assigned for error, lacks an essential element, viz., notice to the plaintiffs of the fact that Frey had no right to control the proceeds of the note. Admitting all the facts offered to be proved, if Reed and Henderson, when they discounted the note, had no knowledge that Mishler was to control the proceeds, they were *bona fide* purchasers of the paper for value, and cannot be affected by the private understanding between Frey and Mishler. The printed form of the note kept for general use, was no notice to the plaintiffs, because the words "credit the drawer," constituting a part of the printed form, were not subscribed by the payee. On the contrary, the fact that they were not subscribed, and that the note was turned over and endorsed by Mishler in the blank, was evidence that the parties did not intend to use the note according to the form. If Mishler intended to control the proceeds he ought to have endorsed the note specially to his own order, or to the credit of his own account.

But by his endorsement in blank he sent the note out into the channels of business to be used by the bearer. The fact that the note is found afterwards in possession of the maker, before it has fallen due, affords no legal presumption that it has been paid and taken up. It is not presumed that the drawer paid it before maturity. This point was decided in *Eckert vs. Cameron*, 7 Wright, 120.

We discover no error in the rejection of the defendant's offer, and the judgment is affirmed.

*Supreme Court of Pennsylvania.

SEEDS vs. KAHLER.

A wife may purchase property on the credit of her separate estate and hold it against the creditors of her husband.

Error to the Court of Common Pleas of Huntingdon County. Opinion delivered June 1, 1874, by

MERCUR, J.—The plaintiff in error was the unquestioned owner of the farm on which she and her husband resided. She was engaged in its cultivation. The jury has found that she owned the stock, farming implements, and crops upon it. Her husband acted as her agent in overseeing the farm, and in conducting her business generally. He had been for many years, prior to the purchase of the mare in question, and then was, notoriously insolvent. She had good pecuniary credit, he had none. The note given on the purchase of the mare of Kahler, indicated upon its face, that her credit, not her husband's, was pledged for its payment. Whether her name was signed as surety or as principal, it professed to bind her only, and not him. Hence, whether the purchase was made of the defendant, as claimed by the plaintiff, or whether it had previously been made of Kahler for her husband, as the defendant testified, the fact remains, that the husband signed the note on behalf of his wife. It is well settled that when the wife has a separate estate, and she buys property on the credit of that separate estate, she may hold it against the creditors of her husband: *Wieman vs.*

[*Original Edition, p. 253.]

Anderson et al., 6 Wright, 311; *Rush vs. Vought*, 5 P. F. Smith, 437; *Brown vs. Pendleton et al.*, 10 P. F. Smith, 417; *Musser vs. Gardner*, 16 P. F. Smith, 242. It is not necessary that she shall have paid for it at the time of her purchase. She is not precluded from buying upon credit, provided it be upon the credit of her separate estate. It is incumbent upon her to establish the fact that the purchase was so made, to protect her title against the creditors of her husband. The fact is to be established by proof which satisfies the jury. As already shown she had a separate estate, her husband had none. The question then is, was there sufficient evidence to leave to the jury to find whether the mare was purchased for the plaintiff and on the credit of her separate estate? Both the plaintiff and her husband distinctly testify that the purchase was made of the defendant some time after he had purchased of Kahler. In answer to the direct question put to the husband, whether it was bought for him or his wife, he answered, "it was bought for Mrs. Seeds, for her use." He also testified that his wife acknowledged her liability to pay. This then was a "ratification of his authority to bind her in the purchase. It is true, in the course of his testimony he said, "we bought" and "we have not yet paid," but this language does not necessarily imply, that he and his wife jointly purchased. The language "we bought" or "we sold" is that which every wife and every child, frequently uses in speaking of a purchase or a sale made by or for the husband and father. It is the familiar expression of every clerk in speaking of the business transactions of his employer. With fully equal reason and propriety may it be used by a husband who is acting as agent for his wife, without conveying the idea he is acting for himself. It was for the jury and not for the court to put a construction on this language, yet the learned judge said to the jury, "it is not alleged that Mrs. Seeds acquired this portion of the property in any other way than by a joint purchase with her husband, therefore, this evidence, it seems to us, fails to establish her claim to this mare, and we so instruct you." The testimony of the defendant that he did not sell the mare to the plaintiff, but purchased her of Kahler for the husband in his own right, created an issue of the fact for the jury. Under proper instructions the court should have submitted the evidence to the jury to find by whom, and on whose credit the purchase was made. The learned judge, therefore, erred in directing the jury to find for the defendant as to the mare.

Judgment reversed and a *venire facias de novo* awarded.

SLEEK *et al.* vs. TURNER'S ASSIGNEE.

1. A judgment note dated more than four months prior to the adjudication of bankruptcy, but entered and execution issued thereon within that time, is not *ipso facto* fraudulent.
2. It requires something more than mere passive non-resistance to invalidate a judgment and levy when the debt is really due and defendant has no defence.

Error to the Court of Common Pleas of Somerset County. Opinion delivered May 25, 1874, by

[*Original Edition, p. 254.]

SHAWWOOD, J.—This was a feigned issue in the court below to determine the validity of a judgment entered upon the twenty-sixth day of February, 1872, upon a judgment note executed by Lewis A. Turner, for the sum of \$204, on the 21st of October, 1871, for a just debt owing by him to Sleek & Blackburn. It was payable in sixty days. On the 10th of April, 1872, certain creditors of Turner presented a petition to the District Court of the United States for the Western District of Pennsylvania to have Turner adjudicated a bankrupt. Under these proceedings, an assignment was made to the plaintiff below on July 5, 1871, and the *fund in court having been raised under an execution upon the judgment, the assignee came in and claimed the money on the ground that the judgment was a fraudulent preference, and void under the thirty-sixth section of the Bankrupt Law, the act of Congress of March 2, 1867. This section provides that "if any person, being insolvent or being in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him procures any part of his property to be attached or seized in execution or makes any pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent and that such attachment, payment, pledge, assignment or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

On the trial of the feigned issue, the learned judge was requested to charge the jury "that if the note, on which the defendant's judgment was entered, was given for a valuable consideration more than four months before the commencement of the proceedings in bankruptcy against L. A. Turner, then the judgment and *fi. fa.* issued thereon are valid, although the judgment was entered and *fi. fa.* was issued within four months of the commencement of said proceedings in bankruptcy, and the verdict must be for the defendants." This point the learned judge refused to affirm, but on the contrary, instructed the jury that when the entry of judgment and execution and levy are made within the four months before the petition of bankruptcy, the preference thus given is invalid, although the judgment note was given more than four months before. In this we think there was an error which ran through and infected the whole charge, it will be unnecessary to consider the other assignments.

It is clear that Turner did not procure the judgment to be entered on the 26th of February, 1872, within four months of the filing of the petition. As to that entry he was entirely passive. He had made and delivered the judgment note on October 4, 1871, more than four months before the petition, for an honest debt, to which he could interpose no defence. He was entirely passive so far as

[*Original Edition, p. 255.]

the entry of the judgment and the issuing of the execution was concerned. How then, could he be said in any sense, to have procured the judgment and execution, and thereby given the defendant a preference? Had the note been a simple note, and defendants had commenced suit upon it, and in due course obtained judgment for want of a plea of affidavit of defence, the case would have *been no stronger. The Supreme Court of the United States have decided that something more than passive nonresistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property when the debt is due and he has no defence: *Wilson vs. The City Bank of St. Paul*, 31 Leg. Int. 29. It was held also in that case, that though the judgment creditor may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law. We regard this decision as directly in point, and are bound to receive it as an authoritative exposition of the act of Congress by the highest tribunal in the land invested by the constitution with the power of deciding such questions in the last resort.

Judgment reversed and a *venire facias de novo* awarded.

Supreme Court of Pennsylvania.

CLAPSADDLE vs. EBERLEY.

Parol evidence may be properly admitted to prove the number of acres in a farm called in testator's will the McKinstry farm.

Error to the Court of Common Pleas of Franklin County. Opinion delivered May 25, 1874, by

SHARSWOOD, J.—Parol evidence was unquestionably admissible to show what was the “extent of the McKinstry farm occupied and farmed by Wm. Brown,” at the date of the will of the testator, Adam Hohe, and that the descriptive addition to the devise, “containing eight fields,” was a mistake. If this was shown it would fall within the rule *Falsa demonstratio non docet*. But it is very plain that this was a question for the jury. However clearly the parol evidence might establish the fact that the McKinstry farm occupied and farmed by Wm. Brown, at the date of the will contained nine fields, and not eight, as described—the credibility of that evidence, and the application of it to the case, must be determined by the jury, under instructions as to its legal effect by the court. We think, therefore, that the learned judge below fell into an error in directing a verdict for the plaintiff, which established that the McKinstry farm did consist of nine fields, and not eight, as described in the will.

Judgment reversed and a *venire facias de novo* awarded.

[*Original Edition, p. 256.]

Court of Quarter Sessions, Philadelphia County.*COMMONWEALTH vs. JONES.**

1. All attempts to commit misdemeanors are indictable at common law.
2. Under the Pennsylvania law an attempt to vote illegally, is indictable as well as the actual commission of the offence.

Opinion delivered *October 10, 1874*, by

PAXSON, J.—The defendant was convicted at the special sessions, in June last, of the offence of attempting to vote illegally. A motion was made by his counsel for a new trial, which motion was argued on the last day of the session prior to the summer vacation.

The indictment contained three counts. The first charges that the defendant not being a qualified voter, fraudulently attempted to vote at the February election in the first division of the fourteenth ward.

The second count charges that the said defendant, being otherwise qualified, attempted to vote at said election out of his proper division.

The third count charges, that the said defendant, not by law qualified to vote in said division, attempted to vote therein. Upon the trial it appeared that the defendant was a duly qualified voter; that he attempted to vote in the first division of the fourteenth ward, and that he was not a resident of that division.

It is therefore clear that this verdict, if sustained at all, can only be so upon the second and third counts.

Upon the argument, the point was raised and pressed with much zeal and ability, that the conviction could not be supported upon either count, for the reason that no offence is charged, either statutory or at the common law.

It will be observed that the indictment charges merely an attempt to vote illegally.

The sixth section of the act of April 6, 1870, provides that, "If any person not a citizen of this commonwealth shall vote, or attempt to vote, at any special, general or presidential election held in this commonwealth, he shall be guilty of felony," etc. This is the only instance I am aware of, in which the statute defines and punishes an attempt to vote illegally; and this implies only to persons who are not citizens of this commonwealth. It has no implication to the case under consideration.

In our criminal procedure act we have a section which provides that, "If, on the trial of any person charged with any felony or *misdemeanor, it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, but was guilty only of an attempt to commit the same, such persons shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon

[*Original Edition, pp. 257 and 258.]

an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment." Section 50.

It was urged that this section was intended to imply to such misdemeanors only as were an offence at common law. In other words, that it is not an indictable offence to attempt a mere statutory misdemeanor. I am not aware that the statute last above quoted has ever received a judicial construction. I have endeavored to give the subject the care and attention to which its importance entitles it.

The report of the commissioners on the *penal code* does not throw any light upon this question. The section itself is new, and they give as a reason for its passage the fact, that prior thereto, "if on an indictment for felony, it appears that some circumstance is wanted to establish the complete technical offence, the prisoner must be acquitted, although the proofs are perfect of an attempt to commit the crime."

An examination of the authorities leaves me in doubt upon the law. The general rule is well established; that any attempt to commit a misdemeanor, is a misdemeanor, whether the offence is created by statute, or was an offence at common law. This broad principle was asserted by Baron Parke, in the case of *Rex vs. Roderich*, 7 C. & P. 795, and has been adopted by the editors of our leading text books on criminal law. See 1 Arch. Crim. Plead. and Ev. 85; 2 Id. 29; Wharton, 79, 812; and Russ. 46. It was also fully recognized by our own Supreme Court in *Smith vs. The Commonwealth*, 4 P. F. S. 209, where, in a very able and interesting opinion, Chief-Justice Woodward reviews the whole subject of attempts, and collects the English cases with great care. Where an offence is made a misdemeanor by statute, it is made so for all purposes: *Rex vs. Butler*, 6 C. & P. 368.

There may be, perhaps, a distinction between misdemeanors which are *mala in se* and such as are *mala prohibita*, as in the case of acts which are not *per se penal*, but made the subject of a statutory fine, as a matter of municipal regulation.

But when the misdemeanor is stamped as a crime by the law, is the subject of indictment, and is punishable by fine and imprisonment, an attempt to commit it is clearly a misdemeanor.

Especially in this case where the offence is one which affects the public injuriously. All attempts tending to the prejudice of the community are indictable; as an attempt to provoke another to send a challenge: *Rex vs. Phillips*, 6 East, 464; an attempt to bribe a cabinet minister to give the defendant an office: *Vaughn's Case*, 4 Burr. 2494; and the same with respect to the promise to a member of a corporation to induce him to vote for the election of a mayor: *Plympton's Case*, 2 Ld. Raym. 1378; or an attempt to bribe a jurymen to give a particular verdict: *Young's Case*, 2 East, 16; or a judge, with intent to corrupt him in a case depending before him, 8 Inst. 147.

None of these cases, drawn from the English law, defines an offence which more directly affects the community than the one under consideration. A blow aimed at the purity of elections is a

[*Original Edition, p. 259.]

crime against the nation. When the ballot-box ceases to reflect the popular will, we shall be in a condition, little better, politically, than a South American republic; if, indeed, it is necessary, even now, to go beyond some of our own Southern States for an illustration.

The view of the law I have indicated harmonizes perfectly with the fiftieth section of the criminal procedure act above referred to, which provides, as already seen, that when a person indicted for a felony or misdemeanor is convicted of the attempt, he may be punished "in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment." This seems a recognition of the broad principle that all attempts to commit misdemeanors are indictable at common law. It is upon this principle that this conviction must rest, as the case does not come within the section above referred to.

The motion for a new trial is overruled, and judgment will be entered on the second and third counts only.

The maximum imprisonment affixed by law to the offence of illegal voting, under appropriate section of the code, is three months. For the attempt to vote, of which this defendant is convicted, the statute affixes no punishment, and we are obliged to look to the common law. The punishment at common law for an attempt to commit a misdemeanor, is by fine or imprisonment, or both. There would be no propriety, however, in imposing for the attempt the full measure of imprisonment designated by the statute for the completed offence.

***Supreme Court of Pennsylvania.**

RODGERS vs. THE RIDDLESBURG COAL AND IRON COMPANY.

1. The admission of copies of field notes of a person who was not even the deputy-surveyor, cannot be admitted.
2. An ancient paper is not only one of great age, but it must come from the proper authority to be admitted.

Error to the Court of Common Pleas of Bedford County. Opinion delivered June 11, 1874, by

GORDON, J.—The admission of the field notes proved by Daniel Sams was erroneous. The notes of a deputy-surveyor may be given in evidence for the purpose of showing location and boundary: *Payne vs. Craft*, 7 W. & S. 458. But we do not understand that Cassidy was the deputy-surveyor who located the warrants, or that the papers offered and admitted were his notes. Sams does not pretend to say that these notes were original, but on the contrary, is of the decided opinion that they were only copies. But whether they were even copies or not is left very much in the dark. Sams believes they were such, because he compared them with some ancient notes which Major Criswell informed him were Cassidy's. This, of course, was evidence of nothing; they were no more than the witness' own notes, made without authority, and to

admit them as evidence was going further than is warranted by any authority yet promulgated.

So the admission of the John Stone draft was error. So far as shown to us it does not appear to be an official paper, neither is it part of the title in controversy, but is used only because the Stone survey is one of the general block of which the mowing survey is part.

This unofficial paper was used to fix the lines of survey as they run upon the ground. As such it was of the highest importance in settling the title to the land in controversy. But of this the best evidence was the return of survey to be found in the land office. It is said that this is an ancient paper, and as such was properly admitted. But in order to the admission of a paper on such grounds, it must appear to be, not only of great age, but to have come from the proper custody: *Lau vs. Mumma*, 7 Wright, 267. The proper custodian of a paper of this kind is the surveyor-general, and his certificate and seal to a copy of the Stone survey would have made it evidence. Why then talk about the admission of a paper as ancient when it can be proved in a manner so simple and easy? We admit such papers without proof of execution only *ex necessitate*, and never when such proof is convenient. We discover no error in the ruling under the third exception.

Judgment reversed and a *venire facias de novo* awarded.

*Supreme Court of Pennsylvania.

COMMONWEALTH *ex rel.* O'CONNOR *vs.* McCUEN *et al.*

Under the act of March 31, 1860, there must be a trial of the case on its merits to justify a finding as to who shall pay the costs; a mere formal verdict is not sufficient to impose the costs on the county.

Error to the Court of Common Pleas of Philadelphia. Opinion delivered February 9, 1874, by

AGNEW, J.—This is not a proceeding in the Court of Quarter Sessions. It is petition to the Court of Common Pleas for a writ of mandamus to compel the city commissioners to draw their warrant on the city treasurer for payment of a bill of costs incurred in the Quarter Sessions. The facts are set forth in the petition and answer, and also in the history of the case, and are therefore regularly before us as the ground on which the mandamus is asked for. James O'Connor, the relator, prosecuted an indictment in the Quarter Sessions against the Trasks and others for a conspiracy in relation to large oil transactions carried on between them. After a trial and disagreement, and discharge of one jury, the prosecutor and defendants came to an arrangement to settle their matters by a reference, and when the indictment came up again, by agreement, the prosecution being abandoned, a verdict was rendered without evidence or trial, of not guilty, and that the county pay the costs. The bill of costs as taxed exceeded two thousand seven hundred dollars, of which the prosecutor claimed two hundred and eight dollars and eighty-eight cents. He, as relator, now seeks this mandamus to

compel the payment of his own bill. It is clearly proved that the criminal proceeding was used by the prosecutor to accomplish a private purpose, rather than to serve the ends of justice. The reference and mode of indictment make this plain. Why should the city be saddled with the costs of such an attempt? Clearly it should not be, unless it has been legally so fixed with their payment as to be beyond escape.

The county or city is never in court to defend herself, and is no party to such a proceeding, and it is the duty of the court to see that she is not charged by mere arrangement of private parties. The purpose of the law was plainly to make the jury to stand as a shield against improper charges, and that the county should be charged only as a result of a trial. The act of March 31, 1860, provides that "in all cases of acquittals by the petit jury on indictments for the offenses aforesaid (viz., misdemeanors), the jury trying the same shall determine by their verdict *whether the county, the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportion." In misdemeanors the parties to an indictment are determined by the law. The 27th section of the act 31st March, 1860, enacts that no person shall be required to answer to an indictment unless the prosecutor's name, if any there be, is endorsed thereon; and when none is avowed, enables the court to hear witnesses and determine whether there is a prosecutor, and if they find there is, to direct his name to be endorsed on the indictment: 1 Brightly's Dig. 381, pl. 28. It has been held also that when the jury find costs against the prosecutor, they must name him in their verdict. It was the evident purpose of the law to place the costs upon the party that has behaved the worst, or to divide them between them in proportion to their demerits. It is not just that the public should pay the expense of a litigation growing out of malice or revenge, or where the behavior of the defendant is deserving of punishment, though he may, through defects of form or of evidence, escape conviction of a technical offence: *Baldwin vs. Commonwealth*, 2 Casey, 172. Hence the act says, the jury trying the same shall determine by their verdict who shall pay the costs. But how can it be said the jury has tried and determined anything, when nothing has been submitted to them? On what principle of propriety or of justice shall it be in the power of the parties to hush up a prosecution and agree to throw the costs on the city or county? Such a verdict is not a trial, and really determines nothing against an absent party. To grant a mandamus in such a case, upon the admitted facts, would make the court a party to a mere shift, by which the parties would unload themselves of all responsibility.

The case is, by its admission and the nature of the application, much stronger than that of *Commonwealth vs. Horner*, 10 Casey, 440, where this court, looking into the facts adduced by the prosecutor himself, refused to reverse the order of the Quarter Sessions setting aside the taxation of the prosecutor's bill of costs. There were two bills of indictment, one for larceny and the other for conspiracy, and a settlement having taken place, the prosecutor filed his bill of

[* Original Edition, p. 262.]

costs in the conspiracy case, while in point of fact the costs were incurred in the felony case. On the testimony taken in the court below, relied on by the prosecutor, upon his writ of error, this court refused in that case to reverse the action of the Quarter Sessions. The determination of the jury in the *very* case, is the only protection the city or county has against fictitious claims. To suffer the costs to be imposed otherwise, would encourage litigation where the arm of the law, in its criminal branch, is used for improper purposes. Fortunately we are not bound to do this wrong. The mandamus is a great prerogative writ, of extraordinary character, which may *not be invoked unless the relator is clearly entitled to it, and has no other legal remedy: *Commonwealth vs. Canal Commissioners*, 2 Penna. 517; *Heston's Case*, 2 W. & S. 416; *Hoffman vs. The Commonwealth*, 4 Casey, 108; 1 Jones, 196. We think that the relator has not shown such a case here as to require us to reverse the refusal of the court below to award the writ.

The judgment is therefore affirmed.

Court of Common Pleas, Schuylkill County.

MORTIMORE vs. O'REAGAN.

It is the duty of a party taking up an award of arbitrators, to file it in the prothonotary's office without unnecessary delay. Where he wilfully retains it in his possession over twenty days, he loses his right of appeal by his own default.

Rule to strike off an appeal. Opinion delivered by

WALKER, J.—In this case an award of arbitrators was made on January 3, 1872, in favor of the defendant. The plaintiff, at whose instance the rule to arbitrate had been entered, took up the award on the same day it was made, and retained it in his possession until the 11th of November, 1872.

On the 1st of April, 1872, the defendant took a rule upon the plaintiff to file the award, returnable to argument day. On the 9th of November, 1872, the rule was argued, and upon the same day made absolute; and upon application for an attachment, the plaintiff filed the award on the 11th of November. On the 6th of November the plaintiff appealed, and the present rule to strike off the appeal was granted on the 2d of December following.

Under this statement was the appeal taken in time?

The act of assembly (Purdon's Dig. 84, pl. 47 and 48) requires the arbitrators to transmit their award to the prothonotary within seven days after signing under penalty of receiving no compensation.

The paper containing the award is a part of the records of the court. A party to a suit has no right to take up an award, except for the purpose of transmitting it to the prothonotary, or filing it in his office. He has no legal right to retain it in his possession a moment longer than it is absolutely necessary. The law makes it the duty of the arbitrators to transmit their finding to the prothonotary, and as it is a court record, issuing out of the court, bearing the seal of the court and the signature of its officer, neither party

[*Original Edition, p. 263.]

to the suit has any right to take it, much less to retain it adversely. See *Boone vs. Reynolds*, 1 S. & R. 231.

It is therefore no excuse for the plaintiff to say that he was not asked for it. His duty was imperative without being asked. We can hardly *suppose that the law which attaches a penalty to the action of the arbitrators for retaining it over seven days, would allow a party, against whom it is made, to hold it for an indefinite period from mere caprice, neglect, or design.

In this case the plaintiff did not file the award until after a rule was taken on him, argued and determined, and an application for an attachment was about being made. Such an one deserves no favor from our hands, even if we had any discretion. Having retained it against every effort of the defendant for more than nine months, if he were still allowed the twenty days for an appeal, he would be greatly benefited by his own wrong. This no court of justice would tolerate. If it did, there is nothing to prevent any party against whom an award might hereafter be made to obtain possession of the paper through trick, fraud or otherwise, and then require the court to go through all the dilatory motions preceding a final determination of a rule in order to gain time beyond what the law gives him.

It is to be hoped that there will be no repetition of the same circumstances.

Rule made absolute.

Supreme Court of Pennsylvania.

THE PROVIDENCE CO. *vs.* THE LOCHIEL IRON CO.

Where there is a written guarantee of the successful operation of the new machinery, the purchaser may try for a reasonable time before returning it to the vendor.

Error to the Court of Common Pleas of Dauphin County.
PER CURIAM. *June 1, 1874.*

In order to affirm this judgment, it is wholly necessary to deny the truth of the propositions of the plaintiff's points, the answers to which are assigned for error. They all overlook the fact that the written proposition, which required the cylinder, valve gear regulators, and necessary posts, to be delivered at the works and placed in successful operation, implies by those words a contract that the machinery should answer its intended purpose. The judge well said that articles of such character, bulk, weight, etc., require trial and much experiment, to determine whether they will answer or not. An immense mill, run by many hands, working large amounts of material, is not to be put out of operation, and its machinery thrown out, much less returned, because of defects which the owners may think it better to try to remedy, than to have the whole cast idle on their hands, until new machinery can be had to supply its place. It was natural they should bear with it long and try many expedients. Having the written guarantee for successful operation it did the plaintiffs no injustice to try the new machinery long and well before throwing it back on their hands. The whole matter de-

[*Original Edition, p. 264.]

pended upon the facts as applied to the written engagement, and these facts were properly submitted to the jury. The case was not that of an ordinary purchase of a thing without special terms, and the property could not, like a horse, or a small machine, be tested and returned in a few days.

Finding no error, the judgment is affirmed.

***Supreme Court of Pennsylvania.**

TAWNEY vs. LONG *et al.*

The undue influence which would be sufficient to destroy a will must be something more than mere importunate persuasions.

Error to the Court of Common Pleas of Adams County. Opinion delivered October 12, 1874, by

GORDON, J.—It is quite probable that in October, 1871, the mind of John Bowman was so unsound as to be incapable of properly disposing of his estate by will. At all events there was evidence thereof sufficient to submit to a jury. On this branch of the case the ruling of the court was strictly correct. Not so, however, on that which relates to the question of undue influence, as an operative cause affecting the old man in the disposition of his property.

The evidence offered for this purpose was wholly insufficient, and should have been rejected.

In treating of this branch of the case, we must treat of it as a distinct issue, for if it be found that the testator was of unsound mind, then the question is determined against the will, and we proceed no further, but if on the other hand this question be determined in favor of the testator's testamentary capacity, then and then only do we consider the proposition involving the subject of undue influence.

However, then, the fact may be—and that fact is hereafter to be determined by a jury—we must, for the present purpose, treat the case as though the testator's sanity were proved. What, then, is there in the evidence to show that John E. Tawney improperly influenced John Bowman in the disposition of his property? That he treated the old man, who by marriage was his uncle, with kindness, that he permitted him to remain at his house, that he bailed him and assisted him when sued by his wife and son-in-law, indicates but ordinary acts of friendship towards a frail old man, rendered necessary from the very circumstances thrown around him by the defendants themselves, but in nothing does it exhibit that corrupt and unlawful influence which amounts to constraint, and which substitutes the will of another for that of the testator. So we have no evidence, except that of Tawney himself, that Bowman ever spoke to him, or he to Bowman, about a will. We give *in extenso* what he says upon that subject. "The day before we came to town, I had a conversation with the old man about making the will. He told me in front of his room he had been thinking about making his will and fixing his things. He did not know whether he could make a will or not; that if he got *like old Mr. Slagle, his property

[*Original Edition, pp. 265 and 266.]

might not reach to keep him. I told him if I was in his place, I would take the good of what I had while I lived, and if there was anything left, it was his own, and he could do with it as he pleased."

Again: "after that Bowman called me into the office and told me he had made up his mind to make a will. He always thought he might give Jake something. He told me the way he was fixed he did not know what to do about it, he asked me what he ought to do about it, I told him if he wanted to give Jake something, he could make it so that his debts and funeral expenses should be paid first, and then he could give Jake whatever he had a mind to; if nothing was left, there would be no harm done."

This testimony does not even raise the idea of solicitation, much less that of improper or fraudulent conduct upon the part of Tawney. It contains but the advice one prudent and cautious neighbor might give to another under like circumstances.

Then we have the declarations of the testator himself as found in the testimony of Henry Long and wife; "that John E. Tawney was ding-donging at him to make his will and leave all he had to him and his family."

But these declarations proved nothing but such solicitations as do not affect the validity of a will. Even importunate persuasion from which a delicate mind would shrink, will not invalidate a devise: *Miller vs. Miller*, 3 S. & R. 467. But beyond this, these declarations are too remote from the time of execution, and are not so connected with other facts and circumstances indicating circumvention or fraud in the procurement of the will as to make them part of the *res gestæ*, and are therefore not evidence: 2 Greenl. Ev., Part 4, sec. 690; *McTaggart vs. Thompson*, 2 Har. 249.

We cannot think, therefore, that all this evidence taken together, was sufficient to raise such a question of undue influence as should have been submitted to the jury.

Undue influence of that kind which will affect the provisions of a testament, must be such as subjugates the mind of the testator to the will of the person operating upon it, and in order to establish this, proof must be made of some fraud practiced, some threats or misrepresentations made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator, and these influences must be proved to have operated as a present constraint, at the very time of making the will. But constraint is not to be inferred from mental weakness alone, though the weak mind may be more readily constrained and deceived than the strong one, and though it is to be considered as a fact in determining the question of constraint, nevertheless, as is said in *McMahon vs. Ryan*, 8 Har. 329, that undue influence which suffices to destroy an alleged will is distinct from weakness, and has no necessary connection with it.

*So it has been held that general bad treatment furnishes no evidence of such influence, and we may add, neither does general kindness, though this may have a powerful influence upon a weak mind, unless it is shown to be part of a crafty arrangement to pro-

[*Original Edition, p. 267.]

cure the testamentary disposition: *Thompson vs. Ryner*, 15 P. F. Smith, 368; *Rudy vs. Ulrich*, 19 P. F. S.; *Eckert vs. Flowry*, 7 Wr. 46.

From the above statement, it is obvious that the case in hand is utterly barren of evidence tending to show undue influence as the cause which operated on the mind of John Bowman to produce the disposition of his property complained of by the defendants. It follows that the court erred in not answering the plaintiff's sixth point in the affirmative.

Judgment reversed and a *venire facias de novo* awarded.

Supreme Court of Pennsylvania.

MILLER & REIST vs. KREITER.

The right of set-off dates from the time that defendant had notice. One defendant may set off his individual claim against a joint claim against him and another.

Error to the Court of Common Pleas of Lancaster County. Opinion delivered May 25, 1874, by

GORDON, J.—Reist, the defendant, by his endorsement of the note drawn by Kreiter to Hostetter, became surety for Kreiter. Hence, as soon as the note was protested, June 10, 1871, and Reist's liability as endorser became fixed and absolute, he was entitled to call upon the maker to exonerate him from such liability, and that even before demand was made upon him for payment: *Beaver vs. Beaver*, 11 Har. 167. His right of set-off, as against any claim Kreiter had against him, may be said to have originated from this period. When, therefore, he paid the note on which he was endorser, May 20, 1873, he was, by force of his equitable status, put in the same position as though he had paid it at the time of protest. Again, as there is no evidence of the date of the assignment to Bomberger of the non-negotiable note drawn by Miller & Reist, on which this suit is founded, and as Reist had no notice thereof previous to the service of the summons, January 25, 1872, as against him, it could only be effective from that date; for the rule is, that the period from which to determine the rights of the assignee and defendant, is not the date of the assignment, but the time when the latter had notice: *Northampton vs. Balliet*, 8 W. & S. 311. It follows, therefore, that Reist's equitable set-off, having arisen before the assignment to Bomberger, he had the right to defalk his claim against the note in suit, and the court should so have ruled.

The counsel for the defendant in error, is mistaken in the supposition that one of two or more defendants may not set-off his individual claim against the joint claim of the plaintiff. The converse of this is held in *Childerston vs. Hammon*, 9 S. & R. 67, and *Archer vs. Dunn*, 2 W. & S. 361.

Judgment reversed and a *venire facias de novo* awarded.

[Original Edition, p. 267.]

***Court of Common Pleas, Schuylkill County.**

McPHILIPS vs. PENNA. CATTLE INS. CO.

1. A plea filed any time before judgment is in time.
2. Judgment for want of an affidavit of defence may be taken twenty days after the return day, except where the twentieth day falls on Sunday, when the whole Monday following is allowed.

Motion for judgment in default of a plea after two weeks notice.

Opinion filed October 27, 1873, by

WALKER, J.—This motion for judgment in the above case, was upon failure to plead after two weeks notice under the 77th rule of court. The rule was entered on the 13th August, 1873, and served on defendant on 22d September, 1873. On 20th October, 1873, upon proof of service, the plaintiff asked for judgment. At the same time, the defendant's counsel presented his plea and desired to have it filed. This was objected to by the plaintiff, and the question here is whether the defendant is in time. There has been no established practice upon this subject. The object of the rule of court was to require parties to have their cases ready for trial, when reached.

Under the law regulating affidavits of defence, judgment may be taken on any motion day in court twenty days after the return day, except where the twentieth day falls on Sunday, in which case it has been held that parties have the whole of Monday following to file their affidavits: *Gosweiler Estate*, 3 Pa. Rep. 200. *Gosweiler Estate* is overruled in *Thomas vs. Affrecks*, 4 Harris, 14, but reinstated in *Cromlien vs. Brink*, 5 Casey, 525, and cases there cited.

Judge Porter there says, that "a day in the sense of the statute has neither length nor breadth, but simply position without magnitude." See also *Marks vs. Russel*, 4 Wr. 372, and in computing time, what days are computed. See S. & R. 411, 5 Harris, 48, 12 Harris, 272.

It has been decided by the Supreme Court that an affidavit filed any time before judgment, though after the twenty days, is in time: *Gillaspie vs. Smith*, 1 Harris, 65.

Even a supplemental affidavit, if filed before judgment, is in time: *West vs. Simmons*, 2 Wharton, 261; *Bloomer vs. Reed*, 10 Harris, 51.

Following the analogy of the reason in those cases, we think that if the plea of the defendant is filed at any time before judgment, it is not too late.

This is a fair construction of the rule of court and in favor of the trial by jury.

Motion refused and defendants' plea permitted to be filed.

[* Original Edition, p. 268.]

Court of Common Pleas, Schuylkill County.*ANTHONY J. YEICH vs. PETERSON & CARPENTER.**

1. What is legal service of summons on an agent under section 1, act May 4, 1853?
2. The record of a justice of the peace should show affirmatively everything necessary to give him jurisdiction.
3. To hold non-resident defendants by a service on an alleged agent, the return of the officer must show that he complied with the act by serving the summons at the place, or one or other of the places, mentioned in the act.

Certiorari. Opinion delivered *October 26, 1874*, by

PERSHING, P. J.—In this case the summons was served on T. E. Mills, as agent for the defendants. It is claimed that this is a good service on the defendants under the 1st section of the act of May 4, 1852, P. L. 574, which provides that "where any person or persons being residents of this commonwealth shall engage in business in any other county than the one in which he, she or they shall reside, and not being in the county at the time of the issuing of such writ or process, it shall be lawful for the officer charged with the service thereof to serve any writ of summons, or any other mesne process, upon the agent or clerk of any such defendant, at the usual place of business or residence of such agent or clerk, and to have the same effect as if served on the principal personally."

On the argument it was agreed that T. E. Mills was agent at the time of the service of the summons in 1872 for Peterson & Carpenter, on the terms mentioned in a printed agreement submitted to the court. From this agreement it appears that Peterson & Carpenter, as co-partners, having their place of business in Philadelphia, appointed T. E. Mills their agent for the sale of the Wheeler & Wilson sewing machines, within certain defined limits in the county of Schuylkill; that they agreed from time to time to furnish and deliver to their said agent, at the express office, steamboat landing, or railroad depot in the city of Philadelphia so many of said machines as in their judgment their said agent might reasonably require. The agreement stipulates that said agent "by way of commission and as a full compensation for his services, and a full remuneration for expenditures of whatever nature incurred in the business of this agency, shall be entitled to receive his commission as set forth" in a schedule with which he was furnished.

The defendants have taken depositions to show that they never employed the plaintiff to transact business for them. His claim is "for commissions on the sale of sewing machines for the firm of Peterson & Carpenter." It is not claimed that the plaintiff was employed by Peterson & Carpenter in any way other than through Mills their agent. *Peterson & Carpenter aver that they never authorized his employment, that the commissions allowed Mills were, by the very terms of the agreement, to cover expenditures of whatever nature incurred in the business of his agency. There is nothing in the agreement which could authorize Mills to employ

[* *Original Edition*, pp. 269 and 270.]

agents or canvassers for Peterson & Carpenter. The defendants also allege that they had no notice whatever of this suit; that their first information that a judgment had been obtained against them was when an execution had issued, and this at a time too late for an appeal. Mills failed to attend at the hearing, and judgment was entered against the defendants by default.

But outside of any question of fact, or any other question of law which might be raised, we think there was no legal service of the summons in this case, and that the exception on this point must be sustained. The record of the justice should show affirmatively everything necessary to give him jurisdiction. Unless the defendants were non-residents of the county, and were not within the county at the time of the issuing of the summons, service upon an agent was a nullity. Thus it was held in *Vankirk vs. Wetherill*, 1 Leg. Gaz. 131, that under this act the sheriff should set forth in his return that the defendant is not a resident, but is engaged in business in his bailiwick. In this case the proceedings before the justice fail to show anything as to the residence or non-residence, the presence or absence of the defendants in or from the county. There is nothing in the form of the suit, nor in the manner of the service of the summons, to rebut the presumption that the defendants were residents of and doing business in this county.

We are also of the opinion that when it is attempted to hold non-resident defendants by a service on an alleged agent, that the return of the officer must show that he complied with the act by serving the summons at the place, or one or other of the places, mentioned in it. The law requires the service of the summons on the agent to be made at the usual place of business or residence of such agent. Where or at what place the service was made on Mills, the alleged agent of the defendants, does not appear from the officer's return, or anything else disclosed in the case. The difference in the phraseology of the statute providing for the service of a summons on one who is himself the defendant in the action, and of that which authorizes service on an agent of a non-resident defendant, must not be disregarded. That this is not a strained construction will be seen from the case of *Kibbe vs. Benson*, Leg. Gaz. 1874, p. 85, decided by the Supreme Court of the United States. Where in actions of ejectment the statute of the State of Illinois required service of the declaration by a copy to the defendant named therein, or in his absence, by leaving the same with some white person of the family of the age of ten years or upwards at the dwelling house of such defendant, and the sheriff made return that he had served the declaration at the *dwelling house of the defendant, by delivering a copy to John Benson, the defendant's father, judgment was taken against the defendant by default. On a subsequent proceeding to set aside this judgment it was shown that the service of the declaration was made 125 feet from the house, but within the yard surrounding it. This was held not to be a compliance with the statute, and the judgment was set aside. This was affirmed by the Supreme Court of the United States in the case we have cited. Says Justice Hunt, "a judgment has been entered where the service was insufficient

[*Original Edition, p. 271.]

and the defendant has had no opportunity to defend his estate." That case and the one now before us are in these respects alike.

The proceedings before the justice are for these reasons reversed.

Court of Common Pleas, Perry County.

GEORGE TITZEL vs. WILLIAM D. SMEIGH, JOHN LEONARD, and JONAS SMITH.

In a judgment against a principal and sureties, parties had voluntarily incurred liability as sureties for stay of execution for all the defendants although only solicited on the part of the principal, and at the expiration of the stay had paid the debt to the plaintiff and then sought substitution against the surety defendants. *Held*, they were without right to the claim.

Rule to show cause why Hugh Campbell, executor of Shuler, deceased, and F. M. McKeehan, should not be subrogated to the rights of plaintiff in the foregoing judgment. Opinion delivered by

JUNKIN, P. J.—Titzel the plaintiff, on the 6th of February, 1872, entered the above stated judgment on a note, in which William D. Smeigh was principal, and John Leonard and Jonas Smith were sureties, and thus all three are defendants, and the real debt is \$245.20.

Two days after its entry, Shuler and McKeehan became security for stay of execution under the following circumstances: Smeigh the principal debtor, and as he swears without telling Leonard and Smith of his intention, and so far as we can see without their knowing of it, or consenting to it, applied to Shuler and McKeehan to go security for stay, etc., and when about to do so before Judge Baker, they both objected, because the printed form of recognizance had been filled up so as to read "upon condition that if the said *William D. Smeigh, the real defendant, etc.*" saying that the understanding was, that they were going security for all the defendants, Smeigh, Leonard and Smith. This shows very clearly that they knew Smeigh was the real or principal debtor, and the other two defendants sureties only.

Then judge and all went to McIntire's office, who was Titzel's attorney, and he, at the request of Shuler and McKeehan, struck out of the recognizance, by drawing his pen over them, the words, "*William D. Smeigh the *real*," so that the stay *prima facie* was for all the defendants; but in point of fact the sureties, Leonard and Smith, were not present, and really knew nothing of the stay being given, or applied for; so that in no wise was the act of the principal their act, nor did Shuler and McKeehan become security at their request. Shuler and McKeehan at expiration of the stay, paid the judgment to the plaintiff, and now seek substitution against Leonard and Smith, the surety defendants.

They say, *prima facie*, the record shows that they were sureties for all the defendants for stay of execution, and that no proof can be let in to show the truth, because that would contradict the record. But the record is silent as to how they became sureties, and at whose instance, and parol proof that Smeigh only, in the absence,

[* *Original Edition*, p. 272.]

and without the knowledge and consent, of Leonard and Smith, induced them, contradicts no part of the record—all this lies in *pais*. Just such evidence was received in *Schnitzel's Appeal*, 13 Wright, 23. We regard this last case, and *Burns vs. Bank*, 1 Penn'a Rep. 395; *Pott vs. Nathans*, 1 W. & S. 155, decisive of the question before us:

First, because the relation of principal and surety continued after judgment: 8 S. & R. 452; *Bank vs. Bank*, 7 W. & S. 342; 8 Barr, 155; *Boschart vs. Brown*, 22 Smith, 372.

Second, "that when a surety intervenes for the purpose of obtaining time for the principal, a prior surety will have the same rights against him, as against the principal—that such prior surety stands in the place of the creditor, and such latter surety stands in the place of the debtor, and can be relieved only by paying the debt." Theobald on Principal and Surety, § 271; *Schnitzel's Appeal*, 13 Wright, 23 to 29; *Burns vs. Bank*, 1 Pa. Rep. 395; *Pott vs. Nathans*, 1 W. & S. 155; *Cornwell's Appeal*, 7 W. & S. 308; *McCormick vs. Irwin*, 11 Casey, 116.

Third. A surety for stay of execution is not favored, is without right of subrogation, except against the primary debtor or his sureties who have become primary to the surety for stay, as where they themselves put in the security for stay. Unless the latter have done this, he is regarded as the destroyer of the original sureties, and equity casts him out, refusing help, save against the principal debtor, and not even against him if the rights of third parties are affected thereby: *Armstrong's Appeal*, 5 W. & S. 356.

Seeing then that Shuler and McKeehan, without the solicitation, knowledge or consent of the sureties, and without power to prevent it in them, *Robison vs. Nabor*, 15 Smith, 85, gave the recognizance, we do not deem it material, that the record *prima facie*, shows them security for all the defendants—the proof shows that as to Leonard and Smith, they voluntarily incurred the liability, and substitution cannot be made.

Rule discharged as to Leonard and Smith.

Court of Common Pleas, Schuylkill County.

HECKSCHER & Co. vs. THE SHENANDOAH CITIZENS' WATER AND GAS COMPANY.

In Pennsylvania the common law distinction of what constitutes a navigable river is not recognized.

An owner of land upon a stream that is not navigable has such a property in the stream, that it cannot be taken away from him by act of legislature, unless just compensation be first made or secured, and then only for public uses.

Whether an owner of land upon a navigable stream, has such a right of property in the stream, *dubitat*.

The act of April 8, 1846, prohibiting courts of equity from issuing injunctions against the erection or use of public works, is by its terms limited to courts within the city and county of Philadelphia, nor would the act be of binding force where an injunction is the only peaceable method of preventing a violation of the constitution.

In equity. Motion for a preliminary injunction. Opinion delivered November 16, 1874, by

GREEN, J.—This is a bill in equity brought for the purpose of en-
[*Original Edition, p. 273.]

joining the defendants from diverting a certain stream of water from the complainant's colliery and appropriating it to their own use. It sets forth that the plaintiffs are the owners of an extensive colliery erected under a lease from the owners of the land, John Gilbert *et al.*, having a number of years to run; that the colliery has eleven boilers for the purpose of generating steam and that it is dependent for its supply of water upon a stream running through the land on which they have built two dams; that the colliery cost about two hundred and fifty thousand dollars and employs about three hundred miners and laborers; and that in addition to the colliery the stream supplies the wants of about twenty-five families residing in the immediate neighborhood, and of about thirty-five head of horses and mules employed by the plaintiffs. It further sets forth that the defendants threaten and have attempted to appropriate the said stream so as to deprive the plaintiffs of the same without making compensation or giving security therefor. An injunction is asked to restrain the defendants.

A good deal of evidence has been taken, but as to most of the facts of the case there is no dispute. The evidence showed that the defendants intended to appropriate only a portion of the stream. Whether this would leave the plaintiffs with a sufficient supply of water for all the purposes of their colliery during a period of drought is a question as to which there is considerable conflict of testimony. It would seem that *during an ordinary season neither the plaintiffs nor the defendants would require the portion of the stream in dispute—that it is only in seasons of dry weather as that region is now suffering under that it becomes important and valuable. The defendants not only supply the borough of Shenandoah with water, but also five or six extensive collieries in and around the borough and one in the Mahanoy valley.

The sources of the stream in question are two springs upon the mountain, some distance apart, upon what are generally known as the Girard Lands. The lower spring appears to be of somewhat greater capacity than the upper, and the streams flowing down the mountain from them unite some distance above the plaintiff's dam. A three or three and a half-inch pipe would probably carry all the water from the two springs. The defendants have laid a two inch pipe to the lower spring for the purpose of tapping it and appropriating it to their own purposes. This they claim they have a right to do under their charter without making compensation beforehand or giving security therefor.

This raises a question of law. Can the legislature of the State give authority to appropriate a stream for public uses, making no provision for compensation, without violating that section of the declaration of rights of the constitution which declares that "private property shall not be taken or applied to public use without authority of law and without just compensation being first made or secured?" Or is there no such taking of private property in the present instance, as is contemplated by the constitution, and is the injury done to the plaintiffs only of such a consequential character that they are entitled to no redress? We must determine

[* *Original Edition*, p. 274.]

what the nature of the property is which a riparian owner has in the stream, and whether it is of such a character as may be taken away in the constitutional sense.

A very marked distinction appears to run through the cases between streams which are navigable and those which are not, in respect to the property which riparian owners may have in them. In a navigable stream the owner of the soil owns only up to low water mark, the ownership of the soil beyond that, and of the water, remaining in the State. But in a stream that is not navigable the owner carries his title to the soil *usque ad flum medium aque*, and if he owns on both sides then he is the owner of the entire bed of the stream and has a qualified ownership in the water itself. He has such a property in it that his neighbor above may not deprive him of it nor divert it out of its accustomed channel so as to change its course over his land.

This distinction is very clearly recognized and followed in the case of *Shrunck vs. The Schuylkill Nav. Co.*, 14 S. & R. 71. The common law of England defines a navigable river to be one in which the tide ebbs and flows, but in Pennsylvania this definition is decided to be too *narrow, and rivers like the Susquehanna, Lehigh, Allegheny, etc., are declared to be navigable rivers owned by the public, with all the rights of navigation and fishing unimpaired by any rights of the owners of the soil along their banks. The remarks of Chief-Justice Tilghman in the case cited are very suggestive of the distinctions we have spoken of. He says "as for the soil over which our great rivers flow, it has never been granted to any one, either by Wm. Penn, or his successors or the State government. Care seems to have been taken from the beginning to preserve the waters for public uses, both for fishing and navigation; and the wisdom of that policy is even more striking than ever, from the great improvements already made and others in contemplation, to effect which it is often necessary to obstruct the flow of the waters in some places and in others to divert its course. It is true, that the State would have a right to do these things for the public benefit, even if the rivers had been private property; but then compensation must have been made to the owners, the amount of which might have been so enormous as to have frustrated, or at least checked these noble undertakings." The same distinction is recognized in the *Monongahela Bridge Co. vs. Kirk*, 10 Wright, 112. The court says that the Monongahela river was by the settled law of Pennsylvania, independent of any act of assembly, a navigable river, and the soil of the river up to low water mark, and the river itself were the property of the commonwealth, as clearly as any tide water river in England is the property of the crown, and that whilst by the common law of England mighty waters such as the Mississippi, Missouri and others were not navigable rivers, but were the subject of private property, yet a more common sense view has been adopted in this State, and all rivers recognized as navigable which were really so. In *McKeen vs. The Delaware Division Canal Co.*, 13 Wr. 424, the same doctrine is held. It is there said that "many laws have been passed, stamping upon numerous smaller streams the

[*Original Edition, p. 275.]

same character, to preserve the public control of the benefit of the highway. The courts have maintained the absolute power of the commonwealth over navigable streams for their improvement as great highways of the people." And further says "every one who buys property upon a navigable stream purchases subject to the supreme rights of the commonwealth to regulate and improve it for the benefit of all her citizens."

Whilst therefore under these decisions it is doubtful whether an owner of land upon a navigable stream can have such a property in the stream as to entitle him to compensation if it were taken away, I conceive there can be none, as to an owner of land upon a stream that is not navigable. But the defendants contend that the only property the plaintiffs have is the right to the use of the water as it flows by—not an absolute *property in the water itself, and that therefore the taking of the water, is not a taking of anything that belongs to the plaintiffs, that it is only depriving them, not of the right of using but of the power of using the water, and that from this it follows that the damage is in the nature of a consequential injury for which there is no redress, and against which the constitution and the charter of the company does not provide.

But this is a refinement of logic which the law will not indulge in for the purpose of stripping one of his rights of property. Nothing is more clearly decided than that when you take away the subject matter upon which a grant is to operate, you take away the grant itself. As well strip the eagle of his plumage, and then say that you have only deprived him of the power, not of the right to fly. A bare naked right this would be indeed; nay it is but cruel mockery to dignify it with the name of a right. When the company diverts the stream, it takes that away from the plaintiffs which they have a right to have. If the company may do this, then the filling up of the channel with earth would be no infringement upon the plaintiffs' right to the water even though it might leave them high and dry, and they should thereby cease to be riparian owners.

It is undoubtedly the law, affirmed and re-affirmed by numerous decisions that the State and those acting under her authority are not liable for consequential damages. I need but refer to the cases of the *Monongahela Nav. Co. vs. Coons*, 6 W. & S. 101; *Susquehanna Canal Co. vs. Wright*, 9 W. & S. 9; *West Branch & Sus. Canal Co. vs. Mullinn*, 18 P. F. S. 360; *Phila. & Trenton R. R. Co.*, 6 Whar. 25 and many others. But the present case is not one of consequential damages merely—and therefore the authorities cited do not rule the present case.

If we go beyond the limits of the State we shall find that the decisions speak just as clearly upon this question. The case of *Gardner vs. The Village of Newburgh*, 2 Johnson's Chan. Rep. 162, decided by Chancellor Kent, is similar, in all its essential features, to the present case. It was an application by an owner for a preliminary injunction to restrain the defendants from taking and diverting a stream of water flowing through his land, and which they were about to lead through pipes to the village for the purpose of supplying the inhabitants.

[* Original Edition, p. 276.]

The statute giving the village the authority had provided for compensation to the owner of the spring and to the owners of land or materials that might be taken, but had made no provision for those who owned land along the stream flowing from the spring. The distinguished chancellor in his opinion says: "it is a clear principle of law, that the owner of land is entitled to the use of a stream of water which has been accustomed from time immemorial to flow through it, and the law gives him ample remedy for the violation of this right," and further says: "a right to a stream of water is as sacred as a right to the soil over which it flows." *An injunction was granted in this case. As illustrating the same general doctrines, see also the case *ex parte Jennings*, 6 Cowen, 527, and Kent's Com. vol. 2, star pages 338-9 and 340, and the notes thereto.

The defendants not having made compensation or given security therefore, I think it clear under the authorities as well as from the general principles of justice that they have no right to take this stream, and that therefore an injunction must issue. It becomes unnecessary for me to discuss the question whether the injury to the plaintiffs by the taking, would be great or small. That is a matter to be decided in another manner.

It is enough to know that plaintiffs' property is proposed to be taken without compensation. It is almost needless to remark that plaintiffs' right to this property is derived from the lease, and the possession they have under it, and that the ownership after the expiration of the lease would again revert to the owners of the soil.

The Shenandoah Citizens' Water & Gas Company was incorporated by virtue of an act of assembly, passed the 25th of February, 1870, Pamph. Laws 1870, p. 246. By the second section, they are authorized *inter alia* to erect fixtures and take water from the stream known as Keely's run, and from other streams flowing upon the property of sundry persons or companies draining the lands situate along the mountain on the north side of said borough, to enter upon lands, etc., to obtain necessary material, etc., and then it is provided that "if any injury is done to private property, the said company shall make compensation therefor, in the manner hereafter provided." Here is an express provision which will not only embrace the taking of property, but will include all injuries done to property whether they be direct or consequential.

But it is to be noted that Sec. 6 which provides the method of making compensation, only provides "for damages claimed for lands or materials taken by the company;" whether this will include damages for the taking of a stream or not, or whether there has been an oversight in providing for the latter, it is not necessary for us to decide.

It is no more than just that such damages should be paid, for the taking of a stream might work most serious injury to a colliery and the case would be one of particular hardship and injustice, where the effect would be to take it from one colliery and give it to others. Damages for injury both direct and consequential are generally provided for in the acts incorporating water companies, and the general law passed last winter also makes such provision.

[*Original Edition, p. 277.]

Clause 2, Sec. 34 and Sec. 41 of act of April 29, 1874. Pamph. Laws 1874, p. 73. Would it not be more consonant with justice, and would it be doing violence to the language used to hold that "the damages claimed for lands or materials taken" was also intended to include the damages for the taking of streams? But we are not called upon to decide this in the present case.

*The defendants claim that it includes damages only for land and materials taken.

It is further urged that the works of the defendants are public in their character, and that by reason of the prohibition contained in the act of April 8, 1846, P. L. 272, the authority of the court to issue an injunction is taken away. But a reference to the act shows that the prohibition extends only to courts within the city and county of Philadelphia. Besides it must be evident that the legislature has no right to nullify that article of the constitution, which provides that compensation must be made or security given before private property can be taken or applied to public uses, and this can only be enforced by injunction or by the strong hand.

For the reasons we have given the preliminary injunction is granted.

Supreme Court of Pennsylvania.

HOUCK *et al.* vs. RITTER.

A husband's assent to the execution of a deed by his wife must be in the manner and form required by the statute.

Error to the Court of Common Pleas of Huntingdon County. Opinion delivered *October 12, 1874*, by

GORDON, J.—The offer of the defendant was not sufficient to raise the question of estoppel as against the plaintiff, and hence was properly rejected.

The assent, or consent of the plaintiff to the execution of the deed by his wife, unless given in the manner and form required by the statute, amounted to nothing. We cannot see that the case was helped by the offer to prove that the woman was induced to take, in lieu of money, a note upon her husband, for the note belonged to her as much as the cash would have done, had it been paid; and so far as he was concerned—as has been well said by the judge who tried the case—there was merely a change of creditors. In the case of *Johnson vs. Fritz*, 8 W. 449, it was proved that the husband actually received part of the purchase-money paid to his wife, and hence it was held, that he was estopped from claiming his courtesy in the land. For my own part, I think this case carries the doctrine of estoppel, quite as far as it should go; nevertheless, did the offer come within this ruling, it would determine the question in favor of the plaintiff in error; but it does not. There is nothing in the offer which proposes to show that the plaintiff derived any benefit whatever from the sale, and we cannot presume that he did.

The note, if not paid during her life, would, at her death, form part of her estate, and as such, be the subject of distribution, either under her will, or under the intestate laws, as the case might be, but it does not follow that in either event, he would be a beneficiary.

Judgment affirmed.

***Supreme Court of Pennsylvania.**VENSEL *et al.* vs. COLNER.

The presumption of notice to the widow of partition and sale, from the recital in the order of sale, will be presumed, especially so after the lapse of twenty years.

Appeal from the Orphans' Court of Clarion County. Opinion delivered November 2, 1874, by

AGNEW, C. J.—This case in nearly all its features is governed by the decision in *Horan's Estate*, 9 P. F. Smith, 152. There, though the practice would be better to give notice to the widows and heirs of the awarding of the partition, it is held to be unnecessary, it being sufficient, if it appears at the return of the writ and inquisition taken, that the parties had notice, at which time it is competent to make objections to the right of partition as well as to the partition itself. In regard to the subsequent rules to accept or refuse, and show cause against a sale, the law does not require service to be made by the sheriff. It may be made by the party or other person. The conclusiveness of the decrees of the Orphans' Court upon matters within its jurisdiction have been so often asserted and repeated, it is unnecessary to cite authority for this well known principle. The distinction upon which the application of this principle depends has been well stated in *Richards vs. Rote*, 18 P. F. Smith, 253, by our brother Sharswood, that when the name of a party in interest does not appear in the petition, decree and notices, unless it appears by affidavit that his name was unknown, and publication made accordingly (under the act of 1835) his share or estate will remain undivided, or undivided if there is a sale ordered, unless by some subsequent act or conduct of such party, or those claiming under him, it has been ratified. But when his name does appear, it will be conclusively presumed in favor of the regularity of the proceedings of a court of justice, that due and regular notice has been given, even though it is not affirmatively shown in the record.

Now in this case the widow was made a party to the petition, and to the writ of partition itself; and in the sheriff's return of the inquisition taken he recites that the parties in the writ were served and warned to appear. This inquisition setting forth that the premises could not be divided, and returning a valuation thereof, was approved by the court. The confirmation after partition or sale has all the effect of a final decree, and is conclusive of the facts set forth in the proceedings which led to the decree. This is sufficient to bind the widow, for the sale was a legal conversion and divested her interest. The order of sale recites the rule on all the heirs and legal representatives to accept or refuse the premises at the valuation, and the rule to show cause why the real estate should *not be sold, and that due proof was made of the service of the rule according to the act of assembly. This is the act of the court by way of recital in the order and is evidence of notice. It is true there is found in the record only the copy of the rule on the heirs

[*Original Edition, pp. 279 and 280.]

to accept or refuse. The rule to show cause against the sale not being returned with the record. But this occurred twenty years and more ago, and the presumption from the recital in the order of sale is, that both rules were issued and served, the clerk having issued them separately. This is a matter of mere practice, and may have arisen from the fact, that as the widow cannot accept premises not divided, but valued and appraised, the necessity for naming her in the rule to accept or refuse, was supposed to be unnecessary. When the premises are accepted they are taken at the valuation fixed by the jury, or now at an advanced bid by one or more of the heirs. But the presumption is that in the rule to show cause against the sale, her name did appear, for in the sale the widow has a direct interest, and the recital of service on the heirs and legal representatives is conclusive of the service on the widow, as a legal representative, this being real estate, and the term legal representatives having therefore no application to the personal representative.

But be the fact as it may the presumption of notice to the widow from the recital in the order of sale must be taken to be true. After twenty years it would be a harsh rule that would deprive an innocent purchaser of his estate because the papers are not all on file in the Orphans' Court. It is proper to add also that the deed to the purchaser recites the proceedings as regular, and as showing the widow a party, and notice to all parties.

The recital in the petition of the administrators of John Vensel, deceased, the purchaser at the Orphans' Court sale, to sell for the payment of his debts, that the property was subject to the dower of Susan Vensel, the widow of Jacob Vensel, deceased, does not change the nature of her estate, which is fixed by the law on an acceptance by the heir, or a sale to a purchaser. The calling of it "dower" is but an ignorant use of a word common in all the country to designate the widow's estate in the real estate of her husband.

But the husband having died intestate and seized, her estate never was dower, and the incorrect use of the term in a subsequent proceeding cannot possibly change the effect of the proceeding in the Orphans' Court, which converted her estate into a money charge upon the premises sold, with the remedy for collection given in the law. In no possible view of this case can the proceedings in the Orphans' Court be overturned. The assignee of the widow occupies no higher place than she did, and must recover according to the nature of her estate only.

Decree of the Orphans' Court affirmed, with costs to be paid by the appellant, and the appeal dismissed.

[*Original Edition, p. 280.*]

***Court of Common Pleas, Schuylkill County.**

STEIGERWALT vs. O'BRIAN.

1. Repairs and additions to a building are not within the purview of the mechanics' lien law. It must be a rebuilding upon another and a larger scale.
2. Newness of structure in the *exterior* is necessary to give notice to purchasers and lien creditors.
3. Whether the erection be new or old is sometimes difficult to decide, and then it is a mixed question of law and fact, and in contested and disputed cases, it is a question for the jury.
4. The refusal of the court to enter nonsuit is discretionary and not reviewable.

Rule to show cause why judgment should not be entered for defendant *non obstante veredicto*. Opinion delivered October 26, 1874, by

WALKER, J.—This is a *scire facias* on a mechanic's lien, for work done and materials furnished in and about defendants' building on Gay street, Tamaqua.

On the trial, after the evidence of the plaintiff had been heard, the defendants' counsel moved for a nonsuit, and assigned for the reason that the testimony does not show that the building (against which the claim is filed) is such an erection as the act of 1836 (Purdon's Digest, 1025, pl. 1 and 2) contemplates, which gives to mechanics and others a lien for work and materials.

This motion was overruled, and all the facts were submitted to the jury, who found for plaintiff \$334.34.

The above rule was then entered to enable us to ascertain whether the lien was within the purview of the act.

Is this building such an erection against which a lien may be filed for work and labor, under the provisions of the mechanics' lien law? The evidence shows that the contract was to rebuild the defendants' house—not repair it.

The front was raised some four feet; a new foundation was built under it; new sills were placed beneath the building; all the weather boarding was removed and made new, except one hundred feet; a roof built new and joined with the old one; a new building was built behind the old one and enlarged, and the old timber was used in the construction of the new structure; the chimney was removed and made new; the floor on second story was new; six enlarged windows were made in the rear, where there were only two before; two doors in front and two in rear, made new, large and paneled. The cornice projecting ten or twelve inches was new; the stairs were torn out and built anew with the addition of a new hall, which the old house had not. The old building was thirty-two feet front by sixteen feet deep. The new one was thirty-two feet front by thirty feet deep and four feet higher. There were nine hundred and fifty-one and a half yards of new plastering done and only eighteen or twenty yards of the old left.

The work was done by a carpenter at the instance of the owner.

A mechanic has no lien for remodeling or repairing an old building: *Perigo vs. Vanhorn*, 2 Miles, 359. Nor for repairs of an old

[*Original Edition, pp. 281 and 282.]

house and improvements of its parts: *Harman vs. Cummings*, 7 Wright, 323. Nor for the addition of a basement story to a frame house: *Miller vs. Oliver*, 8 Watts, 514. Nor for repairs and alterations which do not fairly change its exterior into a new structure: *Miller vs. Hershey*, 9 P. F. S. 64.

It must be a new erection: *Landis' Appeal*, 10 Barr, 879.

Hence it was held in the last case (*Landis' Appeal*) that where the front wall of a house was taken down and a new one erected on a different foundation and the inside of the house except the floors, was altered and removed and a new roof put on and a new back building erected, that the claims for work and materials, were not liens within the act.

In *Driesbach vs. Keller*, 2 Barr, 77, it was held that repairs and additions may constitute a new erection within the act. The addition of one story and a new building beside the old house, of equal dimensions, the whole being new roofed and weather boarded, with interior communication constitute a new erection.

It is difficult to reconcile these two cases, especially as the former does not overrule the latter. Taken together they determine no sufficiently certain rule. See Judge Sharswood's opinion in *Norris' Appeal*, 6 Casey, 127.

But in *Hershey vs. Sherk*, 8 P. F. S. 384, Judge Sharswood says: The principle, as laid down originally in *Driesbach vs. Keller*, 2 Barr, 77, "That a substantial addition of material parts, a rebuilding upon another and larger scale, constitutes a new building, even though parts of the old are preserved and incorporated in the new."

In *Armstrong vs. Ware*, 8 Harris, 520, Lowrie, J., says: "Where a structure of a building is so completely changed that in common parlance it may be properly called a new building, or a rebuilding, it comes within the lien law."

In addition to these rules Judge Agnew in *Miller vs. Hershey*, 9 P. F. S. 65, lays down the rule that newness of structure in the main mass of the building, that entire change of exterior appearance, which denotes a different building from that which gave place to it (though some parts of the old may enter into it) is that which constitutes a new building as distinguished from one altered. The building should present that external change indicating newness of structure which would put purchasers and lien creditors upon inquiry.

In *Nelson vs. Campbell*, 4 C. 156, it is held, that it is not necessary that the new building should be distinct from the old; and a new wing *or an addition to a building is an erection within the meaning of the mechanics' lien law: *Harman vs. Cummings*, 7 Wright, 322. So is a kitchen: *Lightfoot vs. Krug*, 11 C. 348; *Prete and Gausler Appeal*, 11 C. 349.

From some of these rulings it is very evident that an important distinction between an old and a new structure is founded upon the exterior, not the interior, change of the erection, for the purpose of putting purchasers and lien creditors upon inquiry. See also *Som-*

[*Original Edition, p. 283.]

merville vs. Wann, 1 Wr. 187. Whether the building be new or old, whether the additions, alterations and improvements amount to a rebuilding of the old, so as to make it a new erection, within the purview of the law, appears to be a mixed question of law and fact and proper for a jury under instructions from the court to pass upon. Sometimes it is said to be a question of law and sometimes of fact: *Yohe's Appeal*, 5 P. F. S. 121.

In difficult cases this much vexed question should be left to a jury: *Armstrong vs. Ware*, 8 H. 520. In other words, as Chief-Justice Thompson facetiously remarks in *Munger vs. Silsbee*, 14 P. F. S. 456, "it has been somewhat tritely said by our court on a contest whether the building was a new structure or only a repair 'that the court would decide the question when it was easy, but when it was difficult it was for the jury to decide.'"

The meaning was that when it depended upon disputed facts it was a question for the jury and not for the court.

The testimony in this case certainly establishes that a new building was erected in the rear of the old one, which, in our opinion, would be sufficient to give the plaintiff a lien under the authorities just cited. The entire appearance of the front or old building was changed; it was larger in height and depth; it presented to purchasers and lien creditors the evidence of newness of structure; it was a substantial addition of material parts and a rebuilding on another and a larger scale.

The very terms of the defendant's contract was to rebuild his house, and the facts in evidence show it was a rebuilding upon a larger scale. We are clearly of the opinion that this was an erection within the purview of the mechanics' lien law.

If the evidence showed a rebuilding or if it raised a doubt as to whether the structure was new or old, it was for the jury (8 H. 520, 14 P. F. S. 454), and it would have been manifest error to have entered a non-suit: *Lehman vs. Kellerman*, 15 P. F. S. 489. But the refusal to enter a non-suit is discretionary and not the subject of review: *Girard vs. Gettig*, 2 Binney, 234; *Bavington vs. Railroad Co.*, 10 Casey, 358; *Pownall vs. Steele*, 2 P. F. S. 446; *Mobley vs. Bruner*, 9 P. F. S. 481; *Lehman vs. Kellerman*, 15 P. F. S. 489; *United States Telegraph Co. vs. Wenger*, 5 P. F. S. 262; *Negley vs. Lindsay*, 17 P. F. S. 228.

Rule discharged.

*Supreme Court of Pennsylvania.

ADAMS vs. THE PITTSBURGH INS. CO.

The evidence must be clear, uncontradictory and distinct to establish a custom or usage in a particular port warranting the captain of a steamboat, under the direction of a part owner, to bind the owners of vessels navigating the Ohio and its tributaries, for the amount of a premium note for the insurance of the boat, executed by the captain.

Error to the Court of Common Pleas of Allegheny County.
Opinion delivered November 16, 1874, by

GORDON, J.—The court below permitted the defendant, part owner
[* Original Edition, p. 284.]

of the steamboat Glasgow, to be charged with the amount of a premium note, executed to the plaintiff by the captain, under the direction of another part owner, for the insurance of the boat. This insurance was made and the note given without the knowledge or consent of the defendant. It is conceded that under ordinary circumstances this could not be done. But the plaintiff was permitted to go to the jury on evidence of a custom or usage of the court of Pittsburgh, warranting the captain thus to bind the owners of vessels navigating the Ohio and its tributaries. It is possible that a usage such as this, though derogatory of the rights of such owners, and not required for the advancement of commerce and trade, might be established by proper proof.

But in order to establish such custom, the evidence by which it is proposed to prove it, must be clear, uncontradictory and distinct. Custom is usage so long established and so well known as to have acquired the force of law. It is obvious, therefore, that a custom not only can, but must be so proved as to leave no doubt upon the mind with reference to its nature and character.

Doubt must be wholly eliminated from the evidence adduced, or the usage is not well proved. In view of these principles we cannot agree that the evidence in this case was such as the court should have submitted to the jury for the purpose proposed. Four witnesses gave their evidence upon this subject. One testifies that the custom is for an owner and the captain to insure for all the owners; the captain signing the premium note. Another states simply that it was customary for the captain to execute the note, but whether under authority of one or all of the owners he does not say. The third that it was customary for the captain to insure for the boat and owners, but adds upon cross-examination that he knew of no case where the captain was not directed by the owner. The fourth that it was the custom for the captain to insure for the owners, as in this case. From this testimony it is impossible to say what the custom or usage is, if indeed any such exists. Has the captain power upon his own motion to insure, or does it require the joint action of a part owner and the captain? May he insure the boat when there is but a single owner or is he confined to cases where there are several joint owners?

These are questions which are legitimately raised from the evidence, and as that evidence does not clearly and definitely answer either of them, the court should not have permitted it to go to the jury.

The judgment is reversed and a *venire facias de novo* awarded.

***Court of Common Pleas, Schuylkill County.**

SCHRADER vs. BURR.

The act of April 9, 1872, "for the better protection of the wages of mechanics, miners, laborers and others," does not give a lien for wages earned after the particular property has been seized by the sheriff on an execution. Property levied is in the custody of the law, and when sold the proceeds are preserved against lien creditors subsequent to the levy.

[*Original Edition, p. 285.]

When a mechanics' lien which is defective has been filed, and the property against which it is entered is sold by the sheriff before the expiration of the six months allowed by law for filing the lien of a mechanic, the claim may be made upon the fund with the same effect that it could be made if a lien sufficient in form and substance had been entered of record before the sale.

In the matter of the exceptions to the report of D. E. Nice, auditor. Opinion delivered December 7, 1874, by

PERSHING, J.—An act of assembly was passed on the 9th day of April, 1872, "for the better protection of the wages of mechanics, miners, laborers and others" (P. L. 47). The first section provides, *inter alia*, that all moneys due for labor and services rendered by any miner, mechanic, laborer or clerk from any person or persons, or chartered company, either as owners, lessees, contractors or under owners of any works, mines, manufactory or other business where clerks, miners or mechanics are employed for any period not exceeding six months immediately preceding the sale and transfer of such works, mines, manufactories or businesses, or other property connected therewith in carrying on said business, by execution or otherwise, preceding the death or insolvency of such employer or employers, shall be a lien on said mine, manufactory, business or other property, to the extent of the interest of said owners or contractors as the case may be in said property and shall be preferred and first paid out of the proceeds of the sale of such mine, manufactory, business or other property as aforesaid, such preferred claim not to exceed two hundred dollars.

The fund in court for distribution arises from the sheriff's sale of the personal property of F. A. Burr, consisting of the *Standard* printing establishment. On the 6th of April, 1874, a rule was granted by the court to show cause why the writ of *fi. fa.* should not be set aside, which rule, after argument, was discharged. Following this were two sales of the property. The purchaser at the first sale having failed to comply with his bid, the second sale was made on the 18th day of July, 1874.

It appears that after the sheriff made his levy the publication of the *Daily and Weekly Standard* was continued for some time by F. A. Burr, the defendant in the execution. The claims for wages presented to the auditor were made on the part of those employed on these newspapers between the date of the levy and the day of the sale. The labor was performed within the six months immediately preceding the sale of the property, and it is claimed that the wages thus earned are preferred liens within the very language of the act of April 9, 1872. This construction, it was argued, is strengthened by a comparison of this act with that passed on the 11th of April, 1862, for the protection of the wages of labor in the counties of Schuylkill, Bedford and Blair. This latter act, section 5, is made to apply to "wages of labor done and performed within six months immediately preceding the assignment, death or levy by execution, mentioned therein." It will be observed that in the act of 1862 the six months within which the wages of labor are preferred, in a case such as the one before us, are reckoned from the date of the levy; in the act of 1872 the date of the sale is the point of time from

[*Original Edition, p. 286.]

which the six months are to run. Was it in the contemplation of the legislature in passing the act of 1872 to allow liens to accumulate against personal property after it had been levied upon with the result, in many instances, of sweeping away the proceeds of a sale from vigilant and meritorious execution creditors? It is a familiar rule of construction that the real intention will always prevail over the literal sense of terms, especially when adherence to literal terms would lead to palpable injustice, contradiction and absurdity. There is no evidence that Mr. Schrader agreed to or was in any way a party to the use of the printing establishment by Mr. Burr after it had been seized by the sheriff. If the broad construction claimed for the act of 1872 is the true one, it is plain that an execution creditor upon whose writ a levy has been made of property abundantly sufficient to satisfy his judgment, may yet realize nothing in consequence of the interposition of liens created after the property was in the custody of the law. Without reference to the words "by execution or otherwise preceding the death or insolvency of such employer or employers" we think the preference given to the wages of labor under the act of 1872 cannot be extended to a time subsequent to the date of the levy. This construction, it seems to us, is alike consonant with reason and authority. The return of the sheriff established beyond controversy that he had seized the property and taken it into his own possession. A sheriff's levy necessarily disturbs the possession of the owner of the goods levied upon. It is a seizure. It cannot be made in Pennsylvania without having the goods levied upon in actual manucapture or control. It vests the possession so fully in the sheriff that he may maintain trespass for any disturbance of it, and of course it divests the possession of the owner. Even the owner himself may become a trespasser against the sheriff by removing the goods from his control: *Welsh vs. Bell*, 8 Casey, 15. The very point before us has been disposed of in a few sentences in the case of **Glass vs. Gilbert*, 8 P. F. S. Chief-Justice Agnew says (page 288): "Property levied is in the custody of the law, the end of which might be defeated if creditors could subsequently acquire a paramount interest in it. It was therefore held that a treasurer's warrant to the sheriff to sell the lands of a delinquent collector of taxes created a lien by seizure, which not only justified the sale, but preserved the proceeds of sale against lien creditors subsequent to the levy."

We think the auditor committed no error in excluding claims for labor, which was performed subsequent to the time of the levy by the sheriff, from participation in the fund for distribution.

Another controverted question involved in the report of the auditor grows out of a mechanic's lien filed by Pott & Vastine against F. A. Burr. When the hearing was had before the auditor, a rule was pending in court to show cause why this lien should not be stricken from the lien docket. This application was based on the decision of the Supreme Court in the case of *St. Clair Coal Co. vs. Martz*, 2 Legal Chronicle, 89. The auditor has made his report in the alternative, one distribution including this mechanics' lien, the other excluding it. It is too plain to admit of argument that the decision

[*Original Edition, p. 287.]

in *St. Clair Coal Co. vs. Martz*, is fatal to the lien as filed. It does not necessarily follow that Pott & Vastine cannot come in upon the fund. On the day of the sale they gave written notice of the amount they claimed as a lien on the press, engine, boiler and gearing, thus limiting it so as to avoid the legal objections to the lien as filed. Independent of their filing any paper, the statute gave a lien which had not expired when the sheriff's sale was made. If the claim filed be defective, the filing of it does not exhaust or affect the lien, which exists independently of it, till the six months have expired. A second, third, or fourth claim may be filed, and no prior one can be pleaded against the last. The means given to mechanics and material men, are not exhausted by an abortive attempt to pursue the directions of the statute, by filing the claim within six months. This is but the mode of giving it fruitful effect; and should it fail from some technical or even substantial defect, the lien is no more destroyed, than would be a bond, sued out by an improper or inappropriate writ. The claim still remains, and so does the lien, until barred by the lapse of six months after the work is finished or materials furnished. To hold otherwise might be attended not only by inconvenience, but gross injustice—a hazard which no analogy in the law calls upon us to encounter, and against which we are admonished by the frequent failures of these recorded claims upon merely formal grounds, or because of the want of the due observance of the statutory requisitions: *Bourmonville vs. Goodall*, 10 Barr, 133; *Chambers vs. Yarnall*, 3 H. 256. Where the property is sold at sheriff's sale before the expiration of the time allowed by law for filing the lien, the claim may then be made upon the fund, with the same effect as it could be made against the building if the claim had been entered of record before its sale: *Yearsley vs. Flanigan*, 10 H. 489.

This disposes of the only objection made to the payment of this lien, in the proceedings before the auditor.

T. P. Trayer, Esq., the assignee in bankruptcy of F. A. Burr, excepts, because the auditor refused to charge Mr. Schrader with the difference between his bid at the first sale, and the amount at which the property was knocked down to him at the second sale. The legal liability of Mr. Schrader must be ascertained by a different proceeding, and we think the auditor very properly refused to entertain the proposition.

That distribution made by the auditor which includes the payment of the mechanic's lien of Pott & Vastine, is confirmed, and all exceptions in conflict with this decision are hereby overruled.

Supreme Court of Pennsylvania.

BELL AND WEIR vs. REED.

No one will be permitted so to excavate his land as to do a permanent injury to the land of his adjainer, when such adjainer's land is in its natural condition, or the injury thereto would result notwithstanding and without artificial pressure thereon.

In equity. Appeal from the decree of the Court of Common Pleas of Allegheny County.

[*Original Edition, p. 288.]

PER CURIAM, *November 9, 1874.*

The rule that the report of a master confirmed by the court, upon the facts will not be revoked except for clear error, applies to this case. The master has found on all the evidence that the quarrying and stripping of the defendants brought down the plaintiff's land, by removing its natural support, without reference to the wall built by the plaintiff and his roadway. Even some of the witnesses of the defendants state facts as to the sliding of the ground with the wall still standing, which, with the age of the wall, and near approach of the stripping, and manifest removal of the stones and earth, as shown upon the measured cross section represented in the draft, contribute to strengthen the master's conclusions. But it is believed the distance of forty feet is too great a restraint in all instances and may prevent a lawful use of the defendants' quarry. The decree of the court will therefore be so modified as to enjoin the defendants from quarrying, excavating and stripping their land so near to the plaintiff's land as to take away its natural lateral support, and cause his land to slide or fall, provided that the defendants may make a nearer approach upon protecting the plaintiff's land from sliding or falling, by means of a substantial stone wall built by the defendants at their own expense, along the boundary line of the plaintiff's land.

With this modification the decree is affirmed at the costs of the appellants, and the appeal dismissed.

***Court of Common Pleas, Lancaster County.**

COMMONWEALTH OF PENNSYLVANIA, at the suggestion of and for use of JAMES SWEENEY, executor of the estate of ELIZABETH SWEENEY, deceased, *vs.* P. W. HOUSEKEEPER.

To plead and demur to the same matter is not allowable. After pleading, a defect in the declaration may be taken advantage of by motion in arrest of judgment, or the defendant may be allowed to withdraw his plea, and then demur.

Rule to withdraw narr., etc. Opinion delivered *November 14, 1874*, by

LIVINGSTON, P. J.—On September 8, 1874, a rule was granted to show cause why plaintiff should not be permitted to withdraw the narr. filed, and file a new narr.

After a plaintiff files his narr. it becomes the duty of the defendant to consider the nature and manner of his defence, if he has one. He should consider whether, on the face of the narr. as drawn and filed, supposing the facts therein stated to be true, the plaintiff appears in his judgment to be, in point of law, entitled to the redress he seeks, in the form of action he has selected. If in his judgment, the plaintiff be not so entitled in point of law, by reason of defect in the form or the substance of his narr., he should except to the declaration on such grounds; in other words he should demur, and not plead.

If he is satisfied that the narr. is neither defective in form nor substance, and that the plaintiff has chosen the proper form of action,

[**Original Edition*, p. 289.]

and he cannot safely demur, his only other mode of defence is to answer the narr. by matter of fact—to enter his plea.

The narr. in this action was filed on November 10, 1871, after an award of arbitrators and an appeal therefrom by the defendant. On February 4, 1874, a rule was served on the defendant to plead. He then examined his case and did not demur; but on the same day, February 4, 1874, filed his plea "payment, and payment with leave, etc.;" and upon the issue raised by this plea the cause was put on the trial list, called for trial on August 26, 1874, when both parties announced themselves ready for trial. A jury was called and sworn, and after progressing a short time plaintiff's counsel asked leave of court to amend the narr. filed by inserting between the words, "default thereon," and, "by means of which," the words "And the said W. B. Hood, trustee as aforesaid, on or about, to wit, the first day of April, A. D. 1869, absconded from and left his residence in Philadelphia City, in the State of Pennsylvania, and *has not since that time resided within the bounds of the State of Pennsylvania," and on the argument it was admitted that the court allowed the amendment.

The defendants then filed a demurrer, general and special.

Under the decisions of the Supreme Court in the cases of *Com. vs. Wenrick*, 8 Watts, 159, *Boyd vs. The Com.*, 12 Casey, 355, we very much doubt whether any such amendment was necessary; but it was made, and having been made the defendant filed a demurrer, which may be considered both general and special. It is in these words: "And now, August 25, defendant comes, etc., and says that plaintiff ought not further to maintain his said action, etc. Because, he says that the said declaration and the matters contained in manner and form as the same are stated and set forth, are not sufficient in law, and he, the said defendant, is not bound to answer the same, and this he is ready to verify, etc. Wherefore the said defendant prays judgment, and that the said plaintiff may be debarred from having or maintaining its aforesaid action thereof against him, etc.

"And the said defendant, for the further cause of demurrer, states and shows to the court the following causes of demurrer to the said declaration:

1. "The declaration does not aver any receipt of property or money.
2. "It does not aver any settlement of account by the trustee, or decree of court for the payment of the money fixing the liability of the principal in said bond.
3. "The declaration does not set out with certainty and precision, and specifically the particular breach for which redress is sought, and in other respects is uncertain, informal, insufficient, etc."

It will be observed that all these alleged causes of demurrer refer to the narr. as originally filed, and to which defendant has entered his plea of payment, and payment with leave, etc., which still remains, and not one of them makes the slightest reference to the amendment. The amendment made no change in the cause of action, nor did it render any change in defendant's plea necessary.

[*Original Edition, p. 290.]

The cause could have been proceeded with as well after as before the amendment, and on the same plea. Here, then, we have a plea in bar, and afterwards a demurrer, general and special. These cannot exist together. It is one of the oldest and most perfectly settled rules of pleading, that it is not allowable both to plead and demur to the same matter; you may plead to one count and demur to another in the same narr.: 5 Wend. 104. You cannot plead and demur to the same count at the same time.

Where, after pleading to a narr., it is found to be defective, the defendant may take advantage of the defect by motion in arrest of judgment: 9 Cush. 151.

*Or, after a plea in bar, the court on application made may, in its discretion, allow a defendant to withdraw his plea and demur: 9 W. & S. 154.

But the mere fact that a declaration has been amended does not make it demurrable, although it may require the defendant to change his pleas, even though it contains a new count, where the new count is no departure, and makes no change in the cause of action: 10 Casey, 358. Hence it follows that the demurrer in the case before us should have been dismissed, and the parties directed to proceed with the trial.

There having been no joinder in demurrer, nor any recognition of it by the plaintiff, leave of court was asked to withdraw the amendment which had produced all this confusion, the plaintiff having arrived at the conclusion that it was unnecessary. Its withdrawal, plaintiff alleges, was permitted by the court. This the defendant denies. And his honor, the judge who presided at the trial, having mislaid or lost his notes of trial, does not remember whether it was or not; all agree, however, that a juror was withdrawn, and the cause continued by the court on August 27, 1874.

And on September 8, 1874, plaintiff's counsel obtained a rule to show cause why plaintiff should not be allowed to withdraw the narr. filed in this suit and file a new narr.

Without being able to procure the notes of trial, and ascertain therefrom the exact state of the case in its different stages as the trial progressed, we are satisfied, from what we have seen in the progress of our investigation of the record and proceedings as admitted, that the demurrer should have been dismissed, and plaintiff allowed to withdraw the amendment; the trial would then have proceeded upon the original narr. and plea. The cause having been continued, however, and the plaintiff having asked to withdraw the narr. filed, and file a new narr., which he may properly do, and which, under our very broad and liberal statutes of amendments, the court may with propriety permit, we have decided to make the rule absolute; but in doing so we cannot refrain from saying that we think the better course to have pursued would have been by citation to file an account, and thus fix the amount of this defendant's liability, if liable, before proceeding in this form, which is in effect an attempt to state the account of an executor by a jury.

Rule made absolute.

Supreme Court of Pennsylvania.*THE ALLEGHENY INS. CO. *vs.* HANLON.**

Where accounts are multitudinous the witness may be allowed to refresh his recollection by means of other accounts and papers as to the items.

Error to the Court of Common Pleas of Allegheny County. Four cases. Writs of error.

PER CURIAM, October 26, 1874.

There was evidence to take the case to the jury on the question of a waiver of *time* in furnishing the preliminary proofs of the plaintiff's loss. The verdict establishes the waiver of thirty days as the time in the case of the *Hibernia Company*. The statements made by the plaintiff and son were correctly admitted in evidence as the account of particulars. He and his son were competent witnesses to prove the items of the account and testify that the statement was made out by them. The fact that they referred to invoices and other papers to assist them in remembering the articles and prices, does not necessarily give the statement the character of a copy or secondary evidence. The point of the matter is that they swear to the statement as their own work, made out from their knowledge of the facts. One may know that he received and had the articles set forth in a certain invoice, and that these articles, or a certain number of them, were destroyed by the fire, and yet be unable to remember the items without the assistance of the invoice to refresh the memory.

In all cases where accounts are multitudinous, the rule as to the personal knowledge of the witness is relaxed. He must be permitted to put the items into an account, and to refresh his recollection by means of other accounts and papers as to the items. Otherwise great injustice would be done. In the account of sales consisting of numerous items, a party rarely recollects all the items, but he can be perfectly certain from his mode of business on finding the entries on his books that the charges were correctly made.

We discover no error in the record, and the judgment is therefore affirmed.

Supreme Court of Pennsylvania.*SMITH *vs.* JOHNSON.**

A fence that is not on the line, but has been put entirely on the property of the adjoining owner by him, is under his complete control.

Error to the Court of Common Pleas of Juniata County. Opinion delivered July 2, 1874, by

MERCUR, J.—Unless the plaintiff in error occupied lands up to the line of the adjacent owner, he was under no legal obligation to put his fence on the line: *Painter vs. Reese*, 2 Barr, 126; *Dysart vs. Leeds*, 2 Barr, 488; *Potts vs. Everhart*, 2 Casey, 493.

He had a right to set his fence in on his own land, and throw open to the public the portion lying between the line and his

[*Original Edition, pp. 292 and 293.]

fence: *Painter vs. Reese, supra*; *Rohrer vs. Rohrer*, 6 Harris, 367. By so doing he was relieved from a continuing obligation to assist in the maintenance of a fence on the line. If the boundary fence had previously been built at the joint expense of the adjoining owners, it gave the plaintiff in error no right to remove any portion of it, on his withdrawing from an occupancy of the land up to it. The fence had not only become common property, but was such a dedication of the materials composing it, to the realty, that he could not remove the portion made by himself, without the consent of the other, and for such a removal he would be liable in trespass: *Stover vs. Hunsicker*, 11 Wright, 514.

The court then committed no error in denying the right of the plaintiff in error to remove a portion of the line fence. He was liable for the damages which the defendant thereby necessarily sustained.

A duty, however, was imposed upon the defendant in error, to protect his crops, by the building of proper fences within a reasonable time. If he neglected this duty, he cannot hold the plaintiff liable for damage done by the cattle of others: *Gregg vs. Gregg*, 5 P. F. Smith, 227.

In protecting his crops the defendant in error had no right to extend his fence over on the land of the plaintiff in error a few feet. By so doing he in turn became a trespasser: *Dysart vs. Leeds, supra*. If he so extended it, the plaintiff in error had an undoubted right to throw down that portion of the fence and remove it from his land. This being a lawful act, no action would lie against him therefor, although his motive thereto may have been malicious: *Jenkins vs. Fowler*, 12 Harris, 308.

The court appears not to have discriminated between the act of the plaintiff in error in removing the line fence, and his removal of the other *fence subsequently built by the defendant in error. The learned judge appears to have ignored the testimony of both Levi Myers and of the plaintiff in error. They both testify that no portion of the fence built by the defendant in error was removed, except that which extended over on to the land of the plaintiff in error. If the jury should find such to be the fact, there could be no recovery therefor. This must not be confounded with a case where the fence is on the very line, and the rails of one extend a few inches beyond the line fence. Hence it was error for the court to take this from the jury and say to them, "after all, the question is simply one of damages." As to one branch of the case there was clearly a question of the right to recover.

In the absence of specific instructions having been asked for, we cannot say there is error in the second assignment; but, as we have shown, the first, third and fourth are sustained.

As we have not been furnished with a copy of the lease, we are unable to determine what property the defendant in error had in the rails composing the fence, or in the growing crop, and therefore give no opinion on the right of the defendant in error to recover for the whole property taken or destroyed.

Judgment reversed, and a *venire facias de novo* awarded.

[*Original Edition, p. 294.]

Court of Common Pleas, Schuylkill County.**JAMES KIRKPATRICK vs. BENJAMIN BIEVER.**

Rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. Opinion delivered *December 14, 1874*, by

PERSHING, P. J.—The affidavit of defence in this case is made by Israel Wensel, whether in the capacity of agent for the defendant, or otherwise, there is nothing in the affidavit to show. It appears, however, from an examination of the papers in this case, that Biever is sued as the maker of the same note on which suit has been brought against Wensel as endorser, to No. 109, of Sept. T. 1874. Time was given the defendant to file a supplemental affidavit of defence, which has expired without any action having been taken for that purpose. The reasons assigned in the disposition made of a similar application in *Kirkpatrick vs. Wensel*, No. 109, Sept. T., 1875, will govern us in the decision of this case, the plaintiff agreeing to allow as a credit, the one hundred dollars which Wensel states he paid the plaintiff on the note. And now, December 14, 1874, judgment in favor of the plaintiff for the want of a sufficient affidavit of defence, for so much as may be found due after deducting the sum of one hundred dollars heretofore paid, as set forth in said affidavit, and admitted by the plaintiff. The amount of the judgment to be liquidated by the prothonotary on five days notice.

Court of Common Pleas, Delaware County.*ROOT & RUST vs. OIL CREEK AND ALLEGHENY RIVER R. R. Co.**

It seems that there can be no *testatum* writs of execution against a corporation. The act of 1870 provides for none.

A *fi. fa.* was issued, immediately returned *nulla bona* and a *testatum* issued to the same return day. The latter writ held irregular and set aside.

Application to set aside *test. fi. fa.* and restrain further proceedings. Rule to show cause, etc. Opinion delivered *August 5, 1874*, by

BROOMALL, P. J.—Judgment was entered in this case upon the verdict of a jury July 7, 1874, for \$118,167.77; the same day a *fi. fa.* was issued returnable fourth Monday of July, 1874, and returned *nulla bona*. On the next day a *testatum fi. fa.* was issued returnable to the same return day, and on July 11, 1874, David McCargo was appointed receiver of the defendants under a mortgage of all its property and franchises, dated May 1, 1868.

The issuing of the *fi. fa.* against a corporation is provided for by the act of April 7, 1870. That act makes no express provision for a *testatum fi. fa.* Does it by implication? The act of 1870 is peculiar; it authorizes a *fi. fa.* from the court in which judgment is entered, and empowers the sheriff or other officer to levy upon the property and franchises of the defendant in any and every county of the commonwealth. This seems to preclude the necessity for a *testatum*. Indeed, it would leave no function for a *testatum*.

[*Original Edition, p. 295.]

It might be argued that under the act of 1836 a *testatum* may follow any *fi. fa.* But in *Bayard's Appeal*, 22 P. F. S. 453, it is held that the act of 1870 supercedes the remedy by sequestration under the act of 1836, and does not change the right of the parties so as to give the plaintiffs an advantage over other creditors, and that the levy does not create a lien upon the property seized.

This makes the *fi. fa.* under the act of 1870 *sui generis*.

Indeed, so peculiar is it, that it will hardly do to infer that a *testatum* may follow in the absence of all necessity and all functions for a *testatum*.

The *fi. fa.* under the act of 1870 is not a writ of execution for the benefit of the plaintiff only. It is a writ to sequester the goods for the benefit of all the creditors, and might with equal propriety have been called by any other name. It has no other resemblance to an ordinary *fi. fa.* than that it issues upon a judgment, and at the instance of the plaintiff.

*The writ issues to the sheriff or other officer of the county in which the judgment is entered and operates all over the State. If it is desired that the sheriff of any other county than the one in which judgment was recovered should execute the process of sequestration, it is easy to procure the judgment to be entered in such county.

But if we admit that a *testatum* is authorized by the act of 1870, the question arises, is the *testatum* in this case regular? The act of 1836 provides, that if the defendants have no property in the county in which the judgment is recovered, the plaintiff may issue a *testatum* to any other county without any previous writ, upon making affidavit of the fact of there being no property in the county. It is only where there is no property in the county that the plaintiff is entitled to a *testatum*, and from the dictum of the District Court, in *Boyer vs. Kimber*, it would seem necessary that the record should show this fact. There are two modes by which this may be brought about. The issuing and the return of a *fi. fa.* and the affidavit.

In this case the plaintiff chose the former. Has he duly followed it? To allow a *testatum* to issue immediately after a *fi. fa.*, and to the same return day, without search for goods in the county, and with no other evidence of want of goods than the immediate return of *nulla bona*, would seem to defeat the intention of the act of 1836. The act provides the affidavit as the only means of dispensing with the actual search for goods in the county. Besides this, though a writ may be returned in fact before the return day, yet generally no action can be predicated upon the return until that day has passed. Hence, generally, the return is not complete until the return day. In the case of *Leshner vs. Gehr*, 1 Dall. 330, it is held that a term must intervene after the return of *nulla bona* on the *fi. fa.* before the *testatum* issues, by which it doubtless meant that the return day of the *fi. fa.* must pass.

It is contended on the part of the plaintiff, that the receiver has no status justifying his application. But the application is not made by him alone; at the time of the presenting of his petition,

the counsel for the defendants made a motion to set aside the *testatum*, etc., and exhibited an affidavit of the treasurer of the company accompanying the papers. The motion was for a distinct rule on the part of the defendants; a single rule, however, was granted upon both applications.

But it is not clear that the receiver has no such status. He would have had if the *fi. fa.* had issued after his appointment: *Robinson vs. Railroad Co.*, 16 P. F. S. 160.

In either case the effect is the same on the receiver's rights. In either case the levy and sale are subject to the mortgage. The interest of the receiver is therefore the same in both cases.

On these grounds the *testatum* is held to be irregular, and is set aside, and the rule prayed for is made absolute thus far and no further.

***Court of Common Pleas, Schuylkill County.**

THE MINERS' TRUST CO. BANK *vs.* JAMES WREN *et al.*

The purchaser of real estate where the sale is made subject to existing liens, may set up the defence of usury to the payment, *pro tanto*, of a judgment which was entered against the property at the time of his purchase, part of the consideration of which is shown to be usurious.

The defence of usury may be raised by others than the borrower himself.

Opinion delivered July 13, 1874, by

PERSHING, P. J.—In this case the plaintiff issued execution against the defendants to collect the amount of a judgment entered by confession on July 10, 1871. to No. 206 September Term, 1871, for the sum of \$15,000, payable in one year. After the entering of this judgment, the real estate of James Wren, one of the defendants, was sold by his assignee in bankruptcy, and purchased by John W. Roseberry, Esq., as trustee for certain of the creditors of James Wren. Mr. Roseberry has presented his petition setting forth the fact of his purchase; that the above judgment is claimed to be a lien on said real estate, and alleges that the consideration for a portion of the said judgment is illegal and usurious. The petitioner further states an offer on his part to pay the amount of said judgment to the plaintiff on condition that an assignment of the judgment and the collaterals held by the bank as security, should be made to him, which offer was not accepted, and that a levy has been made by the plaintiff on said real estate. The petition prays the court to set aside the writ of *fi. fa.*, to open the judgment, and let the petitioner into a defence for that part of the judgment alleged to be usurious.

The evidence taken on the rule granted on the filing of the petition shows that the defendants were engaged in business under the style of James Wren & Co.; that the firm borrowed money from the Miners' Trust Co. Bank, for which the members of the firm confessed a judgment for \$15,000, payable in one year; that for this they received a bank book in which they were credited with \$12,750; and that the balance, \$2,250, was retained by the bank for the use of \$12,750, for the year which the loan had to run. Both

[* *Original Edition*, p. 297.]

Wren and Noble (the latter testifying that he represented Rhoda) who were examined as witnesses, state that they claim no deduction from the amount of the judgment, on the ground of excessive interest.

The court refused to set aside the *fi. fa.* and open the judgment, but directed that an issue be formed, the *fi. fa.* to be stayed in the meantime, to determine:

1. What portion of the judgment of the Miners' Trust Co. Bank against James Wren, John T. Noble and Matthew Rhoda, was founded on a usurious consideration?

*2. How much was due on said judgment?

As the facts were not in dispute, and were all in evidence before the court, the counsel for the plaintiff thought a trial unnecessary, and before the filing of the order directing an issue, requested that it be dispensed with.

As a matter of law they denied the right of Mr. Roseberry, or of those whom he represented, or of any one but the borrower himself, to raise the defence of usury. This, therefore, presents the only question for our decision.

That the defence of usury is a personal privilege, of which none but the borrower can avail himself, is settled by the decisions of the courts in many of the States. Without attempting to review the numerous cases to which our attention has been directed, it is sufficient for our present purpose to say, that they are decided on statutes which make all contracts void where usury enters into them. This is true of New York, upon the decisions of the courts of which State some stress was laid at the argument. All usurious agreements are there declared to be void, and the lender is subject to a penalty. In a late case: *Berdan vs. Sedgwick*, 45 N. Y. R. 626, decided in 1871, such agreements are said to be void, however, in a limited sense. In that case Hunt, Commissioner of Appeals, now Associate Justice of the Supreme Court of the United States, said: "That the borrower only is entitled to interpose the defence of usury, is also a well settled principle: *Cole vs. Savage*, 10 Paige, 583; *Williams vs. Tilt*, 36 N. Y. 319. This principle is subject to many exceptions. Thus, it is not doubted that heirs may make the defence with equal effect, as the ancestors could make it. The defence may be made on the same principle by devisees, by subsequent mortgagees and purchasers, and by trustees; the heir is privy in blood, the devisee or purchaser is privy in estate, and each, in this respect, succeeds to the right of his ancestor or grantor: *Cole vs. Savage, supra*; *Hartley vs. Harrison*, 24 N. Y. 171; *Post vs. Dart*, 8 Paige, 639. As it is expressed in the head note to the last mentioned case, 'the defence of usury may be set up by any one who claims under the mortgagee, and in privity with him. For the usurious mortgage is void, not only as to the mortgagor, but as to all others who succeed to his rights in the mortgaged premises, either by operation of law or otherwise.' . . . In the case of *Post vs. Dart*, judgment *pro confesso* had been taken against the mortgagor by which his liability to pay the debt was fixed by judgment. The court, nevertheless, granted the Bank of Utica, a subsequent

[*Original Edition, p. 298.]

purchaser, an order and a commission for the purpose of establishing the usury, assuming that the purchaser might litigate that point, although the liability of the mortgagor was not open to further question."

We have quoted this case at this length, regarding it as applicable *to the case in hand, though made under a statute much more stringent than that of our own State on the subject of usury.

In Pennsylvania where a debtor refuses to move for the benefit of his creditors, they will be permitted to move in his name.

An insolvent man is not permitted to give away his property by means of a judgment, which, though proper at first, has become a security for less than the amount of it: *Lewis vs. Rodgers*, 4 H. 18; *Clark et al. vs. Douglass*, 12 P. F. S. 408. It is claimed, however, that the direct question before us has never been decided in this State. In *Verner vs. Carson et al.*, 16 P. F. S. 440, the question whether any one but the borrower or debtor can set up the defence of usury under the act of May 28, 1858, is left undecided. If still an open question, there are decisions of our courts which, we think, go far towards settling it. In *Fisher vs. Kahlman*, 3 Phila. R. 213, decided by Judge Sharswood, in the District Court of Philadelphia, defence was taken on the ground of usury, in behalf of a *terre tenant*, who became purchaser of mortgaged premises at sheriff's sale, under a judgment subject to the mortgage. It is held in that case that, "whenever usury avoids the contract, the defence is personal to the party to whom the loan was made. But so far as it amounts to a *pro tanto* failure of consideration, it is very clearly settled that the plaintiff will be enjoined or precluded from the recovery of more than the just sum advanced and lawful interest thereon: *Cab vs. Savage*, 1 Clark, 482; *Post vs. Bank of Utica*, 7 Hill, 391; *Nisbet vs. Walker*, 4 Georgia, 221; *Thom vs. Dout*, 8 Gill, 1." In Pennsylvania, it is said in the same case, usury does not avoid the security. It is the unlawful part only which is made null. It seems right, therefore, in the case of a purchaser, to show that the security is for more on its face than was actually advanced at the time.

In *Bachdell's Appeal*, 6 P. F. S. 387, on a question of distribution, the auditor decided that judgment creditors could question the validity of a prior judgment on the ground of usury, and reduced a usurious judgment accordingly. This was affirmed by the Supreme Court. See also *Lord vs. Scott*, 4 Peters, 505; *Greene vs. Tyler & Co.*, 3 Wright, 361; *Fitzsimmons vs. Baum*, 8 Wr. 32.

It has been argued that the purchase of the property sold by the assignee, was made subject to the liens upon it, and that this precludes any objection to the validity or amount of the plaintiff's judgment. Assignees in bankruptcy take the property of the bankrupt subject to the liens legally and *bona fide* existing as against the bankrupt. They have a right to discharge incumbrances, and may file a bill against all incumbrancers, to ascertain the validity, priority, and amount of their several claims: *James on Bankruptcy*, 43, 44; *McLean vs. Lafayette Bank*, 3 McLean, 587. The sale in this instance was made without the assignee having first *discharged the

[*Original Edition, pp. 299 and 300.]

incumbrances. Is his vendee in any worse position for testing the validity of the liens, for which the property sold by the assignee may be seized in payment? We think not. If James Wren had actually paid a portion of the plaintiff's judgment, would the purchaser at the sale made by the assignee be precluded from showing that fact, because he bought subject to the liens legally and *bona fide* existing against the bankrupt's estate? In law the payment of usurious interest is a payment of the principal debt to the extent of the excess over the legal rate of interest: *Primrose vs. Anderson*, 12 H. 215. Where a purchaser buys expressly subject to usurious incumbrances, he will be held to their payment. But a purchaser of lands at sheriff's sale, on judgment and execution at law, subject to all prior legal incumbrances, can take advantage of usury in a mortgage of prior date to the judgment: *Cummins vs. Ewir*, 2 Hals. Ch. R. 73. Nor do we think the position that Mr. Roseberry is a mere stranger in this proceeding well taken. It is decided in *Carden vs. Kelly*, 59 Barb. 239, that an execution creditor, who asserts a lien upon mortgaged property, is not a stranger within the meaning of the rule that the defence of usury is a personal one, and cannot be pleaded by one having neither priority of estate nor of blood with the borrower. We think that Mr. Roseberry as the purchaser of real estate bound by the lien of the plaintiff's judgment, may object to and resist the payment of that part of the judgment which is shown to be usurious.

And now, July 13, 1874, it is ordered and directed that the *fi. fa.* on the judgment of the Miners' Trust Co. Bank against James Wren, John T. Noble and Matthew Rhoda be restricted to the collection of the sum of \$12,750, with interest thereon and costs, so far as it is attempted to collect said judgment by levy and sale of the real estate sold by the assignee in bankruptcy of James Wren to John W. Roseberry.

Court of Common Pleas, Schuylkill County.

WILLIAM ZIMMERMAN vs. H. W. TRACY *et al.*, School Directors of Pinegrove School District, and J. W. BARR, Collector.

1. Since the passage of the act of February 23, 1866, P. Laws, 83, exempting real estate from taxation for State purposes, the maximum for school purposes on real estate is ten mills on a dollar, to be applied to the payment of *salaries, books, stationery, lights, fuel, repairs*, and other incidental and ordinary expenses of the public schools.
2. The special (or building) tax is solely for the purchase of grounds and buildings, and cannot be used for repairs and improvements of old erections.

In equity. Opinion delivered November 30, 1874, by

WALKER, J.—In this bill the complainant avers that he is a taxpayer in the borough of Pinegrove, Schuylkill county. That the six *defendants first named are school directors of the school district of Pinegrove borough, that they have levied a school tax of twelve mills on the dollar of the last adjusted valuation of the district for the year 1874, and that they have issued their warrant to J. W. Barr as collector, who now seeks to collect the same from

[*Original Edition, p. 301.]

the complainant. This he alleges is illegal and beyond the power of the board to levy. An injunction is therefore asked to restrain him from collecting the excess over ten mills. The defendants contend that the two mills is a special tax for building purposes, and to support this position the minutes of the school board of the 18th of July, 1874, and the affidavits of H. W. Tracy, Guy Wheeler, and J. W. Barr have been read in evidence. The parties have agreed upon the facts in writing and have filed the same, from which it appears that the tax, levied by the board as a building tax on the 18th of July, 1874, is not for the purpose of purchasing or paying for the ground, or for the payment of the building, or for the erection of a school building, but for repairs and constructing improvements in and about the building and grounds.

The affidavit of Dr. Robinson shows that the school house for which this tax is required (situate on the corner of Mill and Mifflin streets) was erected over fifteen years ago. The only question here is, "*Have the directors transcended their granted powers?*"

Courts of equity have no control over the discretionary powers of school directors. If they exercise their unquestionable granted powers unwisely, there is no judicial remedy: 9 Wr. 390. But if the directors refuse to perform their duties, or transcend their authority, or misjudge their powers, a court of equity will interfere to compel, restrain, or correct them: *Wharton vs. Cass Township Directors*, 6 Wr. 358.

The power of taxation exists wholly by statute. History teaches us that all free people have been jealous of taxation, and have tolerated it on account of its necessity, and then only as imposed by themselves or their representatives. While the power of the legislature to tax for public purposes is almost unlimited, the school board can levy no tax unless authorized by law, and they are held strictly within their granted powers. To determine whether the directors have exceeded their authority, we must look to the facts of this case and the several acts of assembly on that subject.

By the 30th section of the act of May 8, 1854 (Pur. Dig. 246, pl. 64), "the board of directors or controllers shall on or before the first Monday in June annually proceed to levy and apportion the school tax, *not exceeding the amount of State and county taxes authorized by law to be assessed on all objects, persons, and property made or to be made taxable for State and county purposes.*"

This section has received a judicial construction by Judge Elwell, in *the case of the Locust Mountain Coal & Iron Co. vs. Curren et al.*, 2 Legal Chron. 249, in which he holds that the amount authorized is to be ascertained by the law in force *at the time of levying the tax* and not at the date of the enactment, and as the law taxing real estate for State purposes has been repealed by the act of February 23, 1866, he holds that the limit of the regular school tax on real estate is ten mills on the dollar. In this decision I fully concur. But the defendants contend that under the 33d section of the same act, P. Dig. 246, pl. 67, a special tax not exceeding the amount of the regular tax may be levied once in each school year, to be applied to the purchase and payment of ground and the erection of

[*Original Edition, p. 802.]

school buildings, and that the excess of two mills is levied by virtue of that authority.

The purpose of the regular tax is for the payment of teachers' salaries, books, stationery, for fuel, lights, repairs and the ordinary and incidental expenses incurred in keeping the school in operation.

The object of the special tax is solely for the payment of the ground and the buildings.

The minutes of the school board show that the special tax of two mills purports to be for building purposes, but it is admitted that the fund is for constructing improvements and repairs to an old building, built as Dr. Robinson testifies over fifteen years ago. Besides this the evidence shows that the public schools in Pinegrove borough have been kept open ten months in the year, the maximum time allowed by the act of assembly (P. D. 245, pl. 62) and there is no allegation that the regular tax is not sufficient to pay these improvements—on the contrary the auditors' report for the year ending June 1, 1874, shows a balance due the board of \$104.69. I am aware that the efficient superintendent of the common schools, for whom I entertain a high respect, has construed this 33d section of the act to extend to repairs and improvements (School Laws, p. 93, sec. 201) but what is conclusive to my mind is the clear and explicit language of the statute. The word "solely" means for no other purpose and is imperative. Any other view would be judicial legislation.

When the defendants levied a building tax to repair an old erection (which should have been done out of the regular fund) they exceeded their powers. And as the maximum tax has been already levied, they cannot increase it under another name, for if they could they would indirectly do what they could not do directly.

The special injunction to restrain the collection of the excess over ten mills, is, therefore, granted.

See *German Township School District vs. Langston*, 24 P. F. S. 454; *St. Clair School Board's Appeal*, 24 P. F. S. 252.

*Court of Common Pleas, Schuylkill County.

KIRKPATRICK vs. WENSEL.

Where suit is brought on a promissory note an affidavit of defence which alleges a payment by the defendant of part of the amount, and that thereupon the plaintiff agreed to cancel and surrender the note, is not sufficient.

Rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. Opinion delivered December 14, 1874, by

PERSHING, P. J.—The defendant who is sued as the endorser of a negotiable note, sets forth in his affidavit of defence, that he "paid at two several times upon the said note the sum of one hundred dollars, and upon the payment of this sum the plaintiff agreed that the said note should be cancelled and given up to defendant," and that the plaintiff, though since requested by the defendant, has "ever since refused to give up said note, according to contract." The

[*Original Edition, p. 303.]

plaintiff is willing to admit the payment of the one hundred dollars stated in the affidavit, but claims that the allegations therein contained do not amount to a defence for the balance alleged to be due on the note in controversy.

When this application was first before us we continued it to enable the defendant to file a supplemental affidavit. This has not been done, and we must dispose of the question as it is presented in the affidavit of defence filed.

The affidavit is not explicit. Whether the one hundred dollars or any part of it, was paid before the maturity of the note, does not appear. No dates are given. It is not stated whether the payment of part of the note, was the consideration for the alleged agreement of the plaintiff to cancel it and give it up.

A defendant is taken to state his case most favorably for himself.

A principal test of the sufficiency of an affidavit of defence is to consider it as a plea in substance, divested of all the formal or technical parts. Treating this affidavit as a plea of accord and satisfaction, its defects are made manifest by a reference to a few of the very many authorities on the subject.

The accord and satisfaction must be advantageous to the creditor. He must receive from it a distinct benefit which otherwise he would not have had. Thus it is settled that a mere receipt by a creditor of part of his debt then due, is not a good defence by way of accord and satisfaction, to an action for the remainder, although the creditor agreed to receive it in full satisfaction—2 Pars. Con. 199, and note; 2 Greenleaf's Ev. § 28.

This is held not to apply to the compromise or settlement of a claim, if the amount is disputed.

*It is reasonable that when the transaction, as alleged by the debtor, implies the creditor's having given up some right of action, or abandoned a claim on any individual, without any apparent advantage to himself, clear and full proof shall be made. It seems to be reasonably well settled by the American cases that the giving and accepting of a smaller sum of money in payment or satisfaction of a larger one due, is not a valid discharge, and cannot be pleaded either as payment, or as accord and satisfaction: 1 Smith's Lead. Cases (Ed. 1844) 257. Neither the payment of an inferior for a greater sum, nor the acceptance of a less sum in money than the amount due, is good: *Diller vs. Brubaker*, 2 P. F. S. 498; *Savage vs. Everman*, 20 P. F. S. 305. Giving what was really the creditor's own before is bad as an accord and satisfaction because there is no valid consideration for the accord: *Keeler vs. Nealy*, 2 Watts, 424. "There must be some consideration," said Lord Ellenborough in *Fitch vs. Sutton*, 5 East, 230, "for the relinquishment of the residue, something collateral, to show the possibility of benefit to the party relinquishing his further claim, otherwise the agreement is *nudum pactum*." As the case before us stands, the receiving of a smaller sum of money in payment of a greater, can be of no advantage to the plaintiff; and the requiring the payment of all he contracted to pay, is no injustice to the defendant.

If it is intended by the affidavit to allege a release on the part of

[*Original Edition, p. 304.]

the plaintiff of the balance payable on the note, it is not stated in terms to make it effective as a defence. Such a release must be under seal.

If the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal, in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole: 1 Sm. L. Cases, 250. Payment of part of a debt, though received in satisfaction of the whole, if without a release under seal, will not have the effect of extinguishing the whole: *Hartman vs. Danner*, per Sharswood, J.; 24 P. F. S. 36.

In deciding this case we have confined ourselves strictly to the principles of the law applicable to contracts for the payment of a sum of money, where the defence set up is a release or discharge of the debtor by the payment of money in amount less than he contracted to pay.

And now, December 14, 1874, judgment in favor of the plaintiff for want of a sufficient affidavit of defence, for so much as may be found due after deducting the sum of one hundred dollars heretofore paid, as set forth in said affidavit, and admitted by the plaintiff. The amount of the judgment to be liquidated by the prothonotary, on five days' notice.

***Court of Common Pleas, Schuylkill County.**

THE COMTH. OF PENN'A *ex rel.* NICHOLAS W. WALEISA vs. ISRAEL WALEISA.

A guardian of the person of an illegitimate child is entitled to its custody in preference to its putative father.

Habeas corpus. Opinion delivered by

WALKER, J.—This is a *habeas corpus* issued upon the petition of the relator, setting forth that his son, Irwin Nicholas Waleisa (a boy of five years old) is deprived of his liberty by his grandfather, the defendant, whom he prays may be produced before the court.

The respondent answers that the boy is the illegitimate child of his daughter Mary who died about the 23d of March, 1874, that the child is in delicate health, requiring great care and constant attention from his grandmother, with whom he has lived since his birth, and that the respondent, in April last, was appointed by the Orphans' Court, guardian of the person and estate of the child.

At the hearing of this case two points were raised.

1st. That the child being illegitimate, the putative father has no legal right to him.

2d. That the respondent having been appointed guardian of his person and estate, is legally entitled to his custody.

1st. At common law a bastard was *filius nullius*, he had no inheritable blood in him, and he could have no heirs except of his own body. The civil law even denied him maintenance under certain circumstances, 1 Blackstone, 458.

[*Original Edition, p. 305.]

If he died seized of land, without issue and without making a will, it escheated to the king, 1 Lord Raymond, 1152.

The legal duty of the putative father extended no further than maintenance—There is a marked legal distinction between the duties and rights of parents of legitimate and illegitimate children.

In the *Commonwealth vs. Anderson*, 1 Ashmead, 55, the court held that the putative father of an illegitimate child is entitled to the custody of the child as against all but his mother. See also *Morets vs. Garnhart*, 7 Watts, 302; *Rex vs. Comforth*, 2 Strange, 1162; *Wright vs. Wright*, 2 Mass. 109.

In cases of fornication and bastardy, no responsibility rests upon the putative father, beyond the consequence of his conviction—and no reciprocal right springs from the duty imposed on him by law: *Directors of the Poor vs. Dungan*, 14 P. F. S. 403. See *Strangaway vs. Robinson*, 4 Taunt. 498.

As the case does not turn upon the decision of this point, I prefer to adopt the *per curiam* opinion of the Supreme Court, in the *Commonwealth vs. Fee*, 6 S. & R. 256, to wit: "We give no opinion upon the *general question of the right of a putative father to the custody of his child."

2d. As to the effect of the appointment of guardian (by the Orphans' Court) with reference to the custody of the child.

This is the sole question involved here. The power and reciprocal duty of guardian and ward is the same *pro tempore* as that of a father and child: 1 Blackstone Com. 462; 9 Harris, 331.

In England the king is the universal guardian of infants—who delegates it to the Lord Chancellor, and by virtue of this power the Chancellor may appoint guardians for such infants as are without them, 1 Blackstone Com. 462 and note 8.

Under the act of 29th of March, 1832, Section 5 (Purdon's Digest, 411, pl. 31), the Orphans' Court of the county where the infant resides, is given the care of his person and his estate—and the power to appoint guardians for those too young to make choice for themselves—the age of 14, being considered the age of legal discretion: *Lee's Appeal*, 3 C. 229; *Arthurs' Appeal*, 1 Grant, 55.

In *Senseman's Appeal*, 9 Harris, 331, it is decided that the appointment of a guardian is a final decision upon the right to the care and control of the person of the minor.

In Pennsylvania, the guardian of the person and the estate is substituted for guardian in *socage* and for *nurture* and performs the duties of both: *Arthurs' Appeal*, 1 Grant, 55. And such guardian stands in relation to his ward *in loco parentis*: *Fernsler vs. Moyer*, 3 W. & S. 416. In *Spring vs. Woodworth*, 4 Allen, 321, the court says: "No doubt as long as the child continues within his jurisdiction, the guardian appointed in the courts of this State would have the exclusive right to the custody of his person."

The guardian for *nurture* in England is entitled to the custody of the child: *Regina vs. Clark*, 40 Eng. Law and Eq. 109.

In a contest between a putative father of an illegitimate child and the legally appointed guardian of his person, I have no hesitation in awarding the custody of the child to the guardian.

[*Original Edition, p. 306.]

The extent to which the authorities go, is to give him the right to the custody of his child next to its mother, as against strangers—but I have failed to find any decision which gives him that right against the guardian of the child's person.

If the effect of such an appointment is to give the guardian the control and custody of the child, then it is evident that that order cannot be annulled or set aside in this collateral proceeding. No principle of law is better established than this.

For these reasons (in which Judge Green, who heard the argument with me, concurs) the application should be denied and the child is hereby remanded to the custody of his guardian, Israel Waleisa.

***Court of Quarter Sessions, Schuylkill County.**

In the matter of the petition of sundry citizens of CASS TOWNSHIP, contesting the township election held on February 17, 1874.

A contest involving the election of different persons to different offices cannot be raised by a single petition. There must be separate petitions for each office that may be contested.

An election held at the proper time and place and by the regularly chosen officers will not be set aside, although fraudulent votes may have been received. The remedy in such case is to purge the polls by striking out the fraudulent votes, if possible.

Motion to quash the above petition. Opinion delivered *November 2, 1874*, by

GREEN, J.—The petition of citizens of the township of Cass sets forth, *inter alia*, that the election officers of that township have returned that James Hughes had been elected supervisor, James O'Maley treasurer, and James Moore and Patrick Derrick school directors at the last election and that these returns were untrue and false. It further sets forth that in point of fact James Carney was the legally elected supervisor and not James Hughes; that Thomas Ryan was duly elected treasurer and not James O'Maley, and that Patrick Kelly and William Shartle were duly elected school directors and not James Moore and Patrick Derrick, having received a majority of the legal votes cast at said election. A number of specifications, charging irregularities in the manner of conducting the election, in the receiving of illegal votes and the rejection of legal votes to an extent sufficient to change the result are given, setting forth in detail the facts relied upon to maintain the issues raised.

The petition is signed by upwards of twenty persons, and it sets forth that they are qualified electors of the said township. The affidavit of two of the petitioners, Hugh Connery and Michael Brennan, accompanies the petition, and they swear that the facts set forth are true to the best of their knowledge and belief. The petition was presented and filed on the 24th of February, 1874.

On the 9th of March following an amended petition was filed. This petition raised a contest as to the election of Alexander McDonald and Thomas Dormer, who had been returned as auditors,

[* *Original Edition*, p. 307.]

and of James McKeown, who had been returned as town clerk, and set forth that Daniel Brennan and William Foyle were duly elected auditors, and Henry Eastcock town clerk, they having received a majority of the legal votes for said offices respectively.

On the 11th of May following a second amended petition was filed. This petition is silent as to any contest for auditors and town clerk and confines the question to the issues raised in the first petition, that is, as to the offices of supervisor, treasurer and school directors. The specifications are ten in number and do not vary substantially from the specifications in the preceding petitions.

The defendants have moved to quash the petition upon various grounds, the principal one being that one petition cannot raise a contest involving the election of different persons to different offices—that there must be separate petitions for each office that may be contested. This objection, if sustained, is fatal to the petition.

Upon reason and the well recognized principles of law this objection seems to me to be well founded. A contest in one and the same proceeding for two or more offices, raises separate and distinct issues between different parties having no connection with each other, and for offices which are entirely independent of each other. The facts which may be proven to decide the issue in one case may be of an entirely different character from the facts proven in the other. The judgment in the one case might be entirely different from the judgment in the other, and the proper disposition of the costs difficult to determine in such an event. Such a joinder of actions between different parties would be unheard of and contrary to all the analogies of the law.

But it may be said the proceeding to contest an election is entirely the creature of statute law. Does the statute authorize the joinder of these different issues in one proceeding? The 153d and 154th sections of the act of July 2, 1839, provide the method of procedure in the case of a contested election and read as follows: Section 153. "The several Courts of Quarter Sessions shall have jurisdiction to hear and determine all cases in which the election of any county or township officer by the citizens in the respective county may be contested." Section 154. "Upon the petition in writing of at least twenty qualified electors of the proper county or township, as the case may be, complaining of an undue election or false return of any such officer, the court shall appoint a suitable time for hearing such complaint, notice of which shall be given to the person returned at least ten days before such hearing, provided, etc."

It is very evident, from the language of the act, that a contest only as to a single office and not as to two or more is contemplated. We have already seen that the general spirit and principles of the law do not require us to enlarge its letter so as to make it embrace three or more contests for as many different offices. The books show many cases of contested elections, but I have found none where more than one contest was waged in a single proceeding. It may be further worthy of remark that the new election law passed

[*Original Edition, p. 308.]

May 19, 1874, also excludes the idea that there can be a proceeding in which more than one office is contested in the same petition. The 18th section of the act directs that "notice of the filing of the petition with a copy thereof shall be served upon the person whose right of office shall be contested."

*The complainants, realizing the force of this objection, claim that, at all events, under the petition, the court has a power after hearing to set aside the election and to declare that none of the persons voted for are entitled to hold the offices. That such a power exists is established by many decisions, but the circumstances under which it may be exercised may be somewhat more difficult to determine. What might be good cause for deciding an election in favor of a contestant would not be necessarily good ground for setting an election aside and creating a vacancy. Where an election is regularly held by legally chosen officers at the place and time fixed by law, it would not be set aside, even though many irregularities may have been committed and enough illegal votes received to have changed the result of the election if it had been conducted fairly. For the election itself is legal, even though the person returned may not be the legally elected officer. I find but few instances of the setting aside of an election, but they serve to illustrate the principle. In the case of *The Penn District Election*, 2 Parsons, 526, the prayer of the petition was to set aside an election at which a number of officers had been returned as elected for the reason that the polls had been closed several hours earlier than the hour prescribed by law. As this deprived the legal voters of the opportunity of exercising the right of suffrage, the election was declared illegal and set aside. So also in the case of *The Locust Ward Election*, 3 Penna. L. J. 341, where the polls had been kept open for some time after the legal hour of closing, and votes enough had been polled after the proper hour to have possibly changed the result, then the election was set aside as not legal. Those voting after the proper hours lost their opportunity, and by receiving their votes it rendered the election just as null as if they had been permitted to cast them on the following day. In *Melvin's Case*, 18 P. F. Smith, 338, it is decided that "if an election be held at a place not fixed by law the returns should be stricken out by the return judges," and that "a whole election district may be stricken out on showing an entire disregard of conformity to the law in holding it, either by design or ignorance," and "where an election was not opened until 2 o'clock P. M., the law requiring it to be opened between 6 and 7 o'clock A. M., the return should be rejected." Says Thompson, C. J., in this case: "The last (that is that no election was legally held) we hold is what occurred here, to wit: that no election was legally held in the districts mentioned in the complaint of the petitioners. The doctrine of striking out entire divisions was held by the Common Pleas in that case and in *Batturs vs. Megary*, 1 Brews. 162, in which we are referred to a decision in 1859 by Judge Taylor, in Blair county, to the same effect. In my opinion, however, this ought never to be done where a legal election as to the time and place is held, although fraudulent votes shall have been received. The remedy in

[*Original Edition, pp. 309 and 310.]

such a case is to purge the polls by striking out the fraudulent votes if possible."

Following the principles indicated in these decisions it is very evident that neither the original petition in the present case nor the amended ones set forth sufficient grounds for setting this election aside. For aught that is alleged to the contrary, the election was entirely legal. It was held at the proper time and place and by the regularly chosen officers. It is true that the power of the court to strike out election returns would seem to be wider in its exercise than the opinion of Justice Thompson would indicate. In the contested election cases of 1867, in Philadelphia, 1 Brewster, 162, various election divisions were stricken out, not because there was no legal election as to the time and place and as to the officers by whom it was held, but because the irregularities and frauds were so great that it was impossible to ascertain the true vote. "Divisions in which the law has been entirely disregarded should be stricken out and the case referred back to allow each party to prove his legal vote," per Allison, P. J., and Pierce, J. "The court have the power to reject an entire poll, but only in the extremest case as where it is impossible to ascertain the true vote. Impossibility is the test," per Brewster, J. But even though whole divisions were thrown out in these cases and also in others, in none was the election set aside. It was not decided that there was no election or that there was a vacancy in the office. The issue in the cases was not whether the election should be set aside, but who was the person legally elected, the contestant or the respondent, and for the purpose of deciding that issue properly it was the unanimous opinion that the proper course would be to throw out those divisions and to refer the case back to allow each party to prove his legal vote.

The real issues in the present case raised by the petition and its amendments are the same as in the several Philadelphia cases referred to. If all the allegations contained in the petitions were true, it would not warrant the setting aside of the election as claimed by the petitioners for the reasons I have already stated. Setting an election aside is one thing, striking out an election division and referring a case back to ascertain the true vote is an entirely different thing. I have, therefore, come to the conclusion that this petition must be quashed.

But I am free to acknowledge that I have felt a certain degree of reluctance in coming to this conclusion. I regard crimes against the ballot box as offences of the most serious character, because they strike at the root of republican institutions. The greatest vigilance should be exercised in detecting and bringing to punishment those who are guilty of committing them. If we are indifferent to their commission, and allow them to go unpunished, we will soon become the prey of the thief and the public plunderer. Our condition would become most deplorable, *like that of those other communities where crimes of this character seem to be of common occurrence because committed with impunity. I feel free to say that if the evidence upon hearing in the present case had shown the fact that the officers of the election had wilfully and

[*Original Edition, p. 311.]

fraudulently violated the law, I should have had no hesitation in holding them to answer for their crime at the bar of criminal justice.

Other reasons have been urged for the quashing of the petition, but under the views taken it does not become necessary to dwell upon them or decide them.

Petition quashed.

Court of Common Pleas of Schuylkill County.

DANIEL ZERBE *et al.* vs. EDWARD ZERBE *et al.*

Heirs at law cannot be disinherited by merely negative words in a will—there must be a devise to another to effect that purpose.

Where a will duly executed appoints executors and authorizes them to sell the property, the power of the executors to act and sell is not taken away by the fact that the only devise of property in the will is void.

A will authorizing executors to sell the property, will authorize a sale of the real estate.

In equity. Opinion delivered *January 4, 1875*, by

GREEN, J.—This bill in equity asks us to restrain the defendants from selling the real estate of Daniel Zerbe, deceased, which has been advertised by them, as executors of said deceased, for sale. This injunction is asked for upon the ground that the alleged will of the decedent is not his will, that it does not devise or bequeath any property, and that the letters testamentary are a nullity, and the defendants but intermeddlers with the property, and that the property descended to the complainants and other heirs of decedent under the intestate laws of the commonwealth. The bill also sets forth that application has been made to the register of wills, to revoke the letters testamentary, and issue letters of administration.

The will is thus attacked not by reason of any invalidity in its execution, nor that the testator was not of sufficient capacity to make a will, nor by reason of any undue influence, but because of the contents of the will itself, which are alleged to be so invalid as to devise nothing, and to give no power to the executors named in the will.

The will in its devising clause is evidently defective. It “gives and bequeaths” to certain of testator’s children and grand-children; but what it gives, whether one dollar or thousands, whether the personal or real property, or but a portion of either, can only be guessed at or surmised. *The scrivener who wrote the will, has, either through ignorance or carelessness, omitted the vital word.

The next clause of the will is as follows: “Item—my sons Daniel and James and my daughter and Louisa’s child, Edward Hummel, they shall have nothing of my estate; they have more now than their shares would come to.”

The counsel for the complainants have argued at very great length, that under the authorities, the children named in the devising clause, take nothing, because nothing is given—that words cannot be supplied or added in order to make the devise of effect, particularly when words of different import will answer equally as well.

[*Original Edition, p. 312.]

They also contend that the clause disinheriting the complainants, is invalid and of no effect, because merely negative words are not sufficient to deprive the heir at law of his inheritance—that the estate must be given by will to another, otherwise the heir takes the estate. It is claimed as a consequence that the estate of the decedent descends to his heirs at law, and that the will is a nullity.

That merely negative words in a will, will not be sufficient to deprive the heir of his inheritance, is shown by abundant authority. No one but the heir can take without a valid will, and it follows necessarily from this, that if a devise to strangers or to some heirs, in exclusion of others, is invalid, then the heir must take. The stranger can only take by force of the will. If it were not so, we should have the anomaly presented of the heir being disinherited by force of the negative words of the will, and the stranger or some of the heirs taking by virtue of an intestate law, which does not provide for him or them.

Powell's rules for the construction of devises, as also Jarman's rules, lay it down as undoubted law. "That the heir is not to be disinherited without an express devise, or necessary implication; such implication imputing not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed." Williams on Ex's. vol. 2, 971.

Our own courts have followed this rule of construction, *Bender vs. Dietrick*, 7 W. & S. 284; *Hitchcock vs. Hitchcock*, 11 Casey, 393. Says Woodward, J., who delivered the opinion of the court, "and still another rule applies here—that merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object." While therefore the general principle is true, that the intention of the testator is to govern in the construction of the will, that intention is but incomplete which only excludes and does not devise. It is not sufficient to avoid the operation of the intestate laws.

Whether the omitted word or words can be supplied in the clause which gives and bequeaths to certain of the children and grandchildren of the testator, so as to make the devise good and valid, is a question *which we think it would be premature at this time for us to decide, under the view we take of this case.

We are asked to enjoin the executors from selling the real estate of the decedent. The only question that can arise here, is as to the power of the executors under the will, the validity of the execution of the will not being contested. The clause of the will bearing upon this is as follows: "Last and also I appoint my son Edward, and John Zimmerman, farmer, as my executors, of this my last will and testament, and they shall have a right to sell the property and make it into money when they think fit to do so, or when it will bring the most money." It is contended that if the devising clause falls, that then the whole will falls, and that therefore the power of the executors to act or to sell, falls with it. But this is a *non sequitur*. There is no such necessary connection between the two as to make the latter clause invalid if the former is.

Even if the devise is invalid on account of its uncertainty, it does

[*Original Edition, p. 313.]

not follow that the executors may not act and sell the property, nor does any inference arise that the testator intended that the latter clause should be invalid if the devise was of no effect. If the will had contained no devise at all, but simply appointed executors, it would have been good and valid. For this there is abundant authority. See Redfield on Wills, vol. 2, p. 59; *Rose vs. Quick*, 6 Casey, 225.

The only remaining question that it is necessary to determine in deciding whether an injunction shall issue or not, is as to the property which the executors are empowered to sell. To what do the words "the property" refer? The complainants contend that the executors can only sell what is devised, that they are executors of nothing, and therefore can sell nothing. This is ingenious but it is far-fetched. The grammatical construction would not refer "the property" to the devising clause, but to the immediately preceding clause in which the testator speaks of "my estate" and to which the word property would more grammatically and just as naturally refer. If both the latter clauses refer to, or explain the property intended to be devised, then it is evident that "the property" and "my estate" are one and the same thing.

The word property is one of large signification and comprises things both real and personal. It is as extensive as the word estate, and its use will authorize the selling of testator's real estate, unless the word has become limited in its meaning by the use of the definite article. See the case of *Foster vs. Stewart*, 6 Harris, 23, where the authorities are reviewed and commented upon as to the extent of the word. The definite article as used here is evidently synonymous with my, and should be so construed. It follows from all I have said that this injunction must be refused.

Quite a number of other questions were discussed in the course of the argument—such as the power of the court to decree the will invalid in a collateral proceeding—the power of a court of equity to interfere by injunction, and whether the complainants had not an ample remedy at law, either by their action of ejectment, if the executors had not the power to sell, or by coming in and claiming their distributive share of the money arising from the sale, if they had the power, but under the view I have taken, it is not necessary to determine them in order to decide whether an injunction shall issue or not.

Injunction refused.

Concurring opinion filed *January 4, 1874*, by

WALKER, J.—This bill sets forth that Daniel Zerbe died in February, 1874, seized of a certain real estate in this county, and that the defendants, claiming to act as executors, under and by virtue of a paper purporting to be the will of the decedent, have advertised and threatened to sell the real estate at public sale, and an injunction is asked to restrain them from proceeding, on the ground that the paper under which they are acting is not the will of said Daniel Zerbe.

The paper bearing date January 10, 1873, signed by the decedent,

has been filed in the register's office and duly probated, and letters testamentary have been issued to the defendants.

The complainants are the heirs of the decedent.

Shall this injunction be granted?

The paper has been admitted to probate, and that fact is presumptive evidence of its validity, and stands until overthrown: *Kenyon vs. Stewart*, 8 Wr. 179; *Holliday vs. Ward*, 7 Harris, 485; *Shields' Appeal*, 8 H. 291; 1 C. 142.

If there be error in this judicial order of the register, the remedy is by appeal to the register's court under the act of March 15, 1832, sec. 31: Pur. Dig. 1255, pl. 19; 1 W. & S. 396.

While the register's decision stands, proceedings in equity cannot be entertained to impeach it, for a decree of a court of competent jurisdiction cannot be set aside in a collateral proceeding: 7 Watts, 51; 12 H. 330; 1 W. & S. 396.

It is contended that the will is unintelligible and therefore void for uncertainty: *Kelley vs. Kelley*, 1 C. 460.

But it is a writing appointing executors, and authorizing them to sell his property. A will is good as to personal property where it only appoints executors: *Rose vs. Quirk*, 6 C. 225. And even the word executors is not material: *Carpenter vs. Cameron*, 7 W. 51. See *Kimmel vs. Wagner*, 2 Leg. Chron. 115.

The only question involved in this application in my opinion is to the construction of the will, as to the power of the executors to sell the *real estate of the testator. There can be no doubt as to their right to sell the personal property, for the probate of the will as to that is final and conclusive: *Logan vs. Watts*, 5 S. & R. 213; *Thompson vs. Thompson*, 9 Barr, 234.

And the executor has control over the personal property of the decedent: 2 Redfield on Wills, 116, 117, 210.

Whether some of the heirs are disinherited or not, will more properly arise upon the distribution of the fund by the executor: *Hitchcock vs. Hitchcock*, 11 C. 393; *Asay vs. Hoover*, 5 Barr, 21.

But there are other reasons why this injunction should not issue. There is no allegation that irreparable injury will ensue, and the facts set forth do not show that to be the case: *Adams' Equity*, 220; *High on Injunctions*, § 464.

If an adequate legal remedy exists, the injury is not irreparable: *Clarke's Appeal*, 12 P. F. S. 447; *New Boston vs. Pottsville Water Co.*, 4 P. F. S. 164.

In an action of ejectment (1 R. 408, and 6 Barr, 435), a construction of this will as to the power of the executors to sell the real estate would be given. At least it is a question of doubt, and unless the necessity be clear, a court of equity will not intervene by injunction: *High on Injunctions*, § 10; 4 Wr. 194.

For these reasons we think the injunction should be refused.

Injunction refused.

[*Original Edition, p. 315.]

Court of Common Pleas, Schuylkill County.**MICHAEL COONEY *et al.* vs. TOWNSHIP OF NORWEGIAN.**

Under the act of 1860, requiring the making and repairing of roads in Schuylkill county, to be sold at public outcry to the lowest bidder, supervisors have no authority to make private contracts for the making or repairing of the public roads. After a private contract made by the supervisor of a township for the making or repairing of a road, has been pronounced illegal by the courts, an act of the legislature, directing the auditing and settling of a claim arising under such contracts, is an attempt to exercise judicial powers, and a departure from the function of legislation.

Opinion delivered May 28, 1873, by

PERSHING, P. J.—In compliance with the act of assembly which made it obligatory on the supervisor of Norwegian township, in the month of March in every year, to sell the making and repairing of the public roads in said township to the lowest and best bidder, Charles Fell, the supervisor of that township in 1864, sold the making and repairing of the roads to Thomas Joyce, who entered into a contract with that officer, which imposed this duty upon him (Joyce) till the 31st day of March, A. D. 1865.

*In September, 1864, Fell made a private contract with the plaintiffs for the building of four culverts upon the public roads of said township for the aggregate sum of \$120. The work was done by the plaintiffs, but the township refused to pay them, and they thereupon brought suit to recover the amount. Defeated in this action, they next brought suit against Fell, and were again unsuccessful.

After these judicial proceedings the act of assembly of May 29, 1871, was passed, which required the auditors of Norwegian township, within thirty days thereafter, to audit the accounts between Charles Fell, the late supervisor, and the plaintiffs for work done in building the four culverts in 1864–65, under the contract made with them, and directed that "said settlement shall be according to the terms of said contract." The supervisor and township clerk were required to draw an order on the township treasurer for whatever sum was found to be due, which amount the township treasurer was required to pay. Power was given the court to enforce compliance with the terms of the act by mandamus. These are the facts briefly stated.

That the private contract made by the supervisor with the plaintiffs was in violation of the act of 1860, does not admit of dispute. If it bound the township, the act of 1860, requiring the making and repairing of roads to be sold at public outcry to the lowest bidder, was nugatory. That the township could not be held was legally determined before the legislature was called on to interfere. The act of May 29, 1871, is not the providing of a remedy where none before existed, but is an attempt to exercise judicial powers. It, in effect, sets aside the decisions of the judicial tribunals, and issues its mandate to the township to pay the claim of the plaintiffs, and this without regard to the nature or character of any defence which the township might have. The act assumes the legality of the con-

[* *Original Edition*, p. 316.]

tract, the indebtedness of the township, and its liability to pay, in the face of the action of the officers of the township and the decisions of the courts. If the payment of this claim can be compelled in this way, this is likely to be but one of a flood of similar acts, passed without notice, in ignorance of the facts, and leading to endless trouble and confusion. The language of Chief-Justice Lowrie, in *Bagg's Appeal*, 7 Wright, 515, is directly applicable to this case: "A man's rights are not decided by due course of law, if the judgment of the courts upon them may be set aside or opened for further litigation by an act of assembly. That would be a plain violation of the due course of law, a departure from the functions of legislation, and an assumption of those of jurisdiction. . . . Any form of direct governmental action on private rights, which, if unusual, is dictated by no imperative public necessity, or which makes a special law for a particular person, or gives directions for the regulation and control of *a particular case after it has arisen, is always arbitrary and dangerous in principle, and almost always unconstitutional." *De Chastellux vs. Fairchild*, 3 H. 18, is an authority in point, and others were cited on the argument by counsel. It is a hardship that the plaintiffs should perform labor and receive no compensation. The only question for our determination is whether the township of Norwegian can be compelled to pay this claim by virtue of the act of May 29, 1871. We think it cannot, and therefore direct judgment to be entered on the case stated for the defendant.

Court of Common Pleas, Schuylkill County.

BROCK, EMERY & Co. vs. DRIEBELBIES.

Judgment was properly entered against a garnishee where the record showed that there was no service on the defendant, who resided out of the county, and that more than five years had elapsed since the rendition of the original judgment without revival.

Attachment execution with notice to Henry Sassaman, as garnishee. Opinion delivered *September 21, 1874*, by

GREEN, J.—A motion has been made to strike off the judgment entered in the above case, for irregularities appearing of record, or to open the judgment, and let the defendant into a defence. This is asked for upon the ground that the attachment in execution issued more than five years after the rendition of the original judgment, which had been revived by a *scire facias*, and that the writ was not served upon the defendant, who therefore had no opportunity of appearing in court, and making defence to the suit.

The original judgment was rendered in 1864, and no process was issued to revive it. The attachment in execution was issued on June 24, 1872, and the writ was served on Sassaman, the garnishee, but not upon the defendant, as to whom there was a return of *non est inventus*.

Interrogatories were filed on December 21, 1872, to which answers were filed by the garnishee on the 4th of January, 1873. On the 27th of January following, judgment was given for the amount

[*Original Edition, p. 317.]

admitted by garnishee to be in his hands, less fifteen dollars, allowed him for attorney fees and expenses in answering the interrogatories, and the damages were assessed by the prothonotary at \$258.36. On the 11th of March following, the defendant appears and makes his motion to have the judgment either stricken off or opened. He asks that this motion be granted because the writ not having been served on him, he has had no day in court, and that he has had no opportunity of claiming the benefit of the exemption laws of which he desires to avail himself.

Upon the argument of the case it was claimed that no judgment could be rendered against a garnishee, when the record showed that there was *no service on the defendant, and that more than five years had elapsed since the rendition of the original judgment without revival. This is the question of law that arises in the case.

That an attachment in execution may issue after the lien of the original judgment has expired is shown by abundant authority. The case of *Ogileby vs. Lee*, 7 W. & S. 444, is a leading one upon this point and is commented upon and followed in *Gemmill vs. Butler*, 4 Barr, 232, and in numerous cases since: 7 Barr, 483; 8 Barr, 266. The course of decision has been uniform on this point. In the case of the *Bank of Chester vs. Ralston*, in 7 Barr, the attachment was held to have been regularly issued even though thirteen years had elapsed since the date of the original judgment and there had been no revival.

But is it claimed that because there was no service upon the defendant, that therefore the judgment in the attachment was erroneous, as it deprived him of the opportunity of claiming the benefit of the exemption law? It is admitted that if the writ had issued within the five years, that this would have been no ground for setting aside the judgment. Why should it be after the five years have elapsed? Does not the defendant lose his opportunity as much in one case as in the other? As the right of issuing the attachment after the lapse of five years clearly exists, the only result is that a defendant must be just as vigilant after that period as it is admitted he must be before. Under the 36th section of the act of 1836, a copy of the attachment was to be served upon the defendant. This was irrespective of the time when it issued. But under this law, two returns of *nihil* were held sufficient in *Gemmill vs. Butler*, 4 Barr, 232. But by the 4th section of the act of March 20, 1845, so much of the law as required service of the attachment on any defendant was repealed, except where the defendant was a resident of the county in which the attachment issued. There being no necessity for a service on the defendant when he resided out of the county, as in the present case, it was immaterial whether the attachment issued before or after the end of the five years.

No irregularity was shown in the entry of the judgment, upon the argument of the case—the only ground for the opening of the judgment urged, being that the defendant might have an opportunity of claiming the benefit of the exemption laws of the commonwealth. But the depositions taken show that the defendant had ample actual notice of the issuing of the writ and also of the

[*Original Edition, p. 318.]

filing of the interrogatories, and that he entirely neglected to make any claim for the benefit of the exemption laws until long after judgment was rendered against the garnishee, and that then the claim was not made to the sheriff, or by plea or writing filed in court, but to the garnishee, Henry Sassaman, by a notice served upon him on the 1st of April, 1873. The judgment was entered January 27, *1873, and it is true that the present rule was taken upon the 11th of March following, but it was asked for "for irregularities appearing upon the record," not as a notice of a claim of exemption.

The defendant having had actual personal notice, was bound to come in and make defence to the suit within the reasonable time which the law gives for that purpose. If his only defence was a claim for the benefit of exemption, he was bound to make that within a reasonable time. I think it is clear that if he negligently waits until after judgment has been rendered against the garnishee, before he moves to assert his claim, he is too late, and his opportunity is gone. The authorities upon these points are very conclusive: *Swanger vs. Snyder*, 14 Wright, 222; *Bair vs. Steinman*, 2 P. F. S. 423; *Yost vs. Heffner*, 19 P. F. S. 68.

The garnishee in his answers undertook to assert the defendant's claim to the benefit of the exemption. But the evidence and the answers show that this was an entirely unauthorized act. The garnishee was a mere volunteer, and the defendant certainly cannot avail himself of the unauthorized act of the garnishee to cure his own negligence.

Our attention has been directed to the decisions reported in the Leg. Int. of November 29, 1872, page 381, case of *Masson vs. Goldstone*. But this bears only upon the irregular method of entering the judgment against the garnishee for want of an appearance, and has no applicability to the present case as to the manner in which the judgment has been entered.

For these reasons the motion to open judgment or to strike it off, must be dismissed.

Rule dismissed.

Court of Common Pleas, Schuylkill County.

WILLIAM L. TORBERT vs. JOHN Y. YOCUM.

Where the jurisdiction of a justice is attacked, evidence may be given *aliunde* to determine the jurisdiction.

A party cannot remit part of a claim to confer jurisdiction on a justice.

Want of jurisdiction may be set up in a *certiorari* to an alias execution to defeat a judgment entered by a justice nine months previously.

Certiorari. Opinion delivered September 21, 1874, by

GREEN, J.—Two exceptions have been filed to this proceeding, the first being to the jurisdiction of the justice because the claim exceeded one hundred dollars, and was only reduced in order to bring it within his jurisdiction, and the second that after the appeal had been regularly taken and costs paid, the justice refused to make out a transcript. As to the first exception the deposition of S. H.

[*Original Edition, p. 319.]

Yocum, the attorney for the defendant, and who was present at the hearing before the justice, shows that the plaintiff's claim was for over one hundred dollars, and that it *was reduced to one hundred dollars in order to give jurisdiction. The justice's record of the case also shows the same very clearly, and also that the defendant objected to the jurisdiction upon that ground. It further shows that after the objection was made, Henry Lochman and Daniel Rissinger were sworn as witnesses for the defendant, and there the justice makes the following entry: "Plaintiff remits part of his claim in order to bring it under the jurisdiction of the justice, and claims but one hundred dollars." The justice after hearing, gave judgment for this amount. The defendant contends that no evidence can be given *aliunde* to contradict this evidence of the justice, and to show that he had jurisdiction he cites the case of *Werner and McGee vs. Scott*, 3 W. 274, wherein a party was not permitted to show that the judgment was founded upon a claim for the use of a horse, and not for the "taking and keeping" as set forth on the docket of the justice. But it must be evident that where the jurisdiction of the justice is attacked the rule must be different, otherwise he would always have it in his power to confer jurisdiction on himself by his entries upon the record. This is a necessary rule in order to prevent a usurpation of power and jurisdiction. Says Woodward, J., in *Collins vs. Collins*, 1 Wr. 390: "The sum demanded is the test of jurisdiction. To get at that, we look at the transcript of the justice and the *narr* on the appeal, and the practice is to receive parol testimony also; and from all these sources to determine the jurisdiction by the matter of the fact." A nice distinction might, perhaps, be drawn between a justice's record, which shows jurisdiction, and one which shows the want of it, because in the latter case the reason for receiving parol testimony in order to contradict the record no longer holds. But this is not necessary to decide in the present instance, for the reason that while the record of the justice is corroborated by the testimony of S. H. Yocum, the attorney, who appeared for the defendant before the justice, we do not think it substantially contradicted by the testimony of the plaintiff. The plaintiff says his bill "amounted to over one hundred dollars," and that the freight the defendant paid was to be deducted. "Not knowing exactly what it was, and not having the bill therefor, I claimed one hundred dollars as the balance." "They owed me more than one hundred dollars, and I took the general ratio of freight as near as I could get at them, and it left a balance of about one hundred dollars. I threw off the balance on account of freight. The contract was, I was to deliver the material and deduct the freight. I agreed that if my claim was anything over one hundred dollars after deducting the freight, that I would abandon all over one hundred dollars as my claim." It is very evident that this does not contradict positively the record of the justice and the testimony of Mr. Yocum. The plaintiff's testimony does not show that the amount of this bill, with the freight *deducted, as to the amount of which there is and was no proof did

[*Original Edition, pp. 320 and 321.]

not exceed one hundred dollars, and that there was no remission of part of the claim so as to give the justice jurisdiction.

It is very clear that a party cannot remit part of his claim so as to reduce it to one hundred dollars or less for the purpose of giving the justice jurisdiction. And a judgment upon such a claim may be objected to at any time. "One who has a demand exceeding one hundred dollars cannot give jurisdiction to a justice by allowing a set-off or counter demand of the defendant, so as to reduce his claim below one hundred dollars:" *Stroh vs. Ulrich*, 1 W. & S. 57. "Where the plaintiff's claim has not been reduced by payments to the statutory standard, he cannot give the justice jurisdiction by remitting part and suing for the balance:" *Collins vs. Collins*, 1 Wright, 390. Says Woodward, J., in the same case: "It is never too late in the progress of a case to take advantage of the want of jurisdiction." "The defendant may object on that ground at any time. Regularly he ought to do it at the earliest possible moment; but laches, no more than consent, can confer jurisdiction," etc. To same effect are *Ingham vs. Sickler*, opinion of Elwell, J., Leg. Chron., vol. 1, page 151, and *Carey vs. Branch No. 2 W. B. A.*, opinion of Walker, J., Leg. Chron., vol. 1, page 170.

"A judgment rendered by a justice of the peace on an award of referees for a sum exceeding \$100 is void for want of jurisdiction:" *Phillips' Appeal*, 10 Casey, 489.

It is very evident, therefore, that the justice of the peace had no jurisdiction of the claim, as the case stood before him, and that even though the defendant neglected to perfect his appeal and did not issue his *certiorari* until nearly nine months after the judgment was rendered and after the second alias execution had issued, still he is not estopped from setting up the want of jurisdiction for the purpose of defeating the judgment.

In this aspect of the case it is immaterial whether the justice refused to make out a transcript of the appeal or not, though perhaps it is due to him to say that we do not think the objection is sustained by the evidence.

Judgment reversed and execution set aside.

Court of Common Pleas, Schuylkill County.

COMMONWEALTH OF PENNA. vs. HENRY CAMORY *et al.*

A summary conviction by a justice of the peace, the record of which is not in conformity with the act of assembly in such case made and provided, will be reversed.

Certiorari. Opinion delivered September 28, 1874, by

GREEN, J.—This is a summary proceeding under the act of April 22, 1794, commonly called the Sunday law. The complaint on which *the warrant issued set forth that the prosecutor, on Sunday, the 9th of November, "saw and heard Henry Camory, should be Rufus, David Garavan, Daniel Benegrove, Gideon Benegrove, Frank Snyder and others trespassing on his land, shooting off and heard discharge of certain guns." The warrants directed the constable to bring the defendants before the justice on the Saturday following at

[*Original Edition, p. 322.]

2 P. M. No return was made to the warrant and the record does not show that any of the defendants were brought or appeared before the justice, or that there was any notice to them, or that there was any hearing of the case, or that any witnesses were sworn. Nothing appears except the following entry, without date: "Complainant be mistaken in David Garavan, one of the defendants. Defendant sworn. Justice decides complainant to pay David Garavan his day and mileage, eighty cents, the said David Garavan not being guilty. Justice decides that Henry Camory, should be Rufus Camory, Daniel Benegrove, Gideon Benegrove, Frank Snyder, Lewis Kreamer, John Grainer and Henry Heilney have violated the act of assembly, therefore defendants pay a fine of \$4.00 each and costs of suit." No complaint has been made against the three latter by name, nor do they appear to have been arrested, nor is there anything to show that they were at any time present before the justice, or notified of any hearing. It is evident a record so informal as this cannot stand. Even though the 4th section of the act of April 22, 1794, sets forth a form of conviction which may be followed and which was evidently designed to dispense with the precision required in every case of summary conviction at the common law, the record in the present case does not pretend to conform to that very general form of conviction. It does not give the day and year of the conviction, neither does it say of what offence they are convicted. It only says they have violated the act of assembly. What act is not stated. Nor what section of the Sunday law. Nor does the record set forth as part of the judgment that in a case of neglect or refusal to pay the fine, and the same cannot be levied by distress, the party convicted shall suffer six days' imprisonment in the house of correction of the proper county.

In the case of *The Com. vs. Nesbit*, 10 Casey, 398, for a violation of the Sunday law, Lowrie, C.-J., says: "It is still essential that a summary conviction shall contain a finding that a special act has been performed by the defendant and that it shall describe or define it in such a way as to individuate it and show that it falls within an unlawful class of acts. Without this a judgment that the law has been violated goes for nothing." In the present case the only finding is that the defendants have violated the act of assembly without even pointing out which one.

The 1st and 2d sections of the act of April 22, 1794, alike prescribe a certain term of imprisonment if the fine imposed on conviction is not paid, and it is decided in the case of *The Com. ex rel. Steward vs. Irwin*, *1 Penna. L. J. 408, "that in a summary conviction under the 2d section of April 22, 1794, for profane swearing, the judgment must ascertain not only the amount of fine inflicted, but also the alternative duration of imprisonment, and if it does not, the proceedings are void and the defendant cannot be held in prison."

It is not necessary to go further and show that a record of conviction which does not show that the parties were present and that there was a hearing is radically defective.

The present record lacks almost every ingredient that is required in a summary proceeding before a magistrate.

The conviction is reversed.

Court of Common Pleas, Schenck County.

ALTER, FOCHT *et al.* vs. BOWMAN.

When tenants operating under a lease to mine coal have worked over their boundary line into adjoining land leased to other tenants, and this clearly is established or conceded, a court of equity will enjoin against any further working.

Where, however, the line is in dispute, an injunction will not be granted until the rights of the respective parties are settled at law or in equity.

Injunction. Opinion delivered by

WALKER, J.—The complainants in this bill ask the court for a special injunction to restrain the defendants from working the Buck Mountain vein of coal on the property of the Delano Land Co.

The evidence shows that on the 1st of July, 1864, the Delano Land Company made a lease to Solomon Alter, Daniel Focht and other complainants of "all the veins of coal which lie between the veins leased to Oliver O. and Jonas Bowman, and those leased to Ruff & Lawton, and having a southern dip between the western line of the Daniel Hurley tract and the eastern line of the William Dewart tract."

The lease to the Bowmans referred to was made November 5, 1862, and having been canceled another one was made to them by the company on May 1, 1865, and which calls for the anticlinal axis which constitutes the northern boundary of the Alter and Focht lease.

From the affidavits of the surveyors and others it is established (and conceded by the defendants) that the Bowmans and those claiming under them have crossed their southern boundary some distance with their gangway as shown on a map and are now mining coal in the territory leased to Alter and Focht.

To prevent the further working of these defendants this injunction is asked for.

Courts of equity will not usually exercise jurisdiction in cases of private nuisance or disturbance of easements, when the right of the complainant is disputed, until he has established his claim in an action of law: **Rhea vs. Forsyth*, 1 Wr. 503; *Mammoth Vein Coal Co. Appeal*, 4 P. F. S. 183; *Brown's Appeal*, 12 P. F. S. 17.

But in the present case the authority of the complainants under their lease to mine coal from the veins referred to is undisputed, and as the boundary line between the parties is ascertained and marked by surveyors chosen by both sides, the right of the complainants is clear and certain and under the 13th section of the act of 16th of June, 1836, relative to courts of equity (Purdon's Digest, 591), the jurisdiction is established whenever the nature of the injury is such that it cannot be adequately compensated by damages or will occasion a constantly recurring grievance. *Adams' Equity*, 210; 2 Story Equity, 925; *Eckert et al. vs. Ferst et al.*, 1 Leg. Chron. R. 329.

[*Original Edition, p. 324.]

In this bill, however, Warren Delano, Jr., Wm. Gihon, John Tucker, Edward King and William Stevenson, trustees of the land and lessors, are joined with the lessees, and an injunction is asked against all the defendants. The only question now is, can this injunction issue against the lessees?

Several affidavits have been read upon the question of location, condition of the operation, and of the trespass complained of.

The lessors have put in an answer denying that the lease of 1865, to the Bowmans, conflicts with their lease to Alter & Focht, and they contend that their answer, at this stage of the proceedings, must be taken as true, and that the clause of indemnity in plaintiff's lease, relative to the interferences of the other tenants on the same tract is a full answer to their complaint.

As to the first point the rule appears to be that the answer to a bill in equity, denying the statements in the bill, and averring otherwise is to be taken as true in the absence of evidence to the contrary: *Paul vs. Carver*, 12 Harris, 207; *Russel's Appeal*, 10 Casey, 258; *Dohnert's Appeal*, 14 P. F. S. 315. But when a replication is filed, it is otherwise: *Hengst's Appeal*, 12 H. 413. See also 16 P. F. S. 483.

2d. As to the clause of indemnity. The evident meaning of this proviso is to protect the lessors, where an interference arises under a previous letting, in the absence of correct information as to the veins already leased.

It certainly cannot mean that after the landowners have leased certain land to Alter & Focht, they could afterwards make a lease to the Bowmans of any part of it, without liability. For if they could lease one foot of previously demised territory, they could lease the whole. Such a construction would be unfair and unreasonable. But the lessors contend that the limits of the lease of 1865, are the same as that of 1862.

The lease of 1865 calls for the anticlinal axis, which constitutes the northern boundary of the Alter & Focht lease, and which, when *executed, was fixed and established. The courses and distances are given also, but as an adjoiner has been called for, it must govern. The rule of law being that where land is described in a deed or official survey by courses and distances and also by calls for adjoiners, the latter when there is a discrepancy invariably govern: *Cox vs. Couch*, 8 Barr, 147; *Petts vs. Gaw*, 3 Harris, 222; *Mackentile vs. Savoy*, 17 S. & R. 104. Except where the lines have been run and marked on the ground: *Quinn vs. Heart*, 7 Wr. 337; *Blasdel vs. Bissell*, 6 Barr, 258; *Craft vs. Yeaney*, 16 P. F. S. 210.

There had been no lines run or marked on the ground previous to the filing of this bill. The call for the adjoiner must govern. Besides this the plaintiffs have shown by the testimony of Peter Bowman that William Stone, the superintendent of the landlords, gave notice to the Bowmans not to work beyond the anticlinal axis; which all parties claim is the northern boundary of complainants' lease. There is no evidence to show that the lessors have done any act or thing in the premises for which they should be restrained.

[*Original Edition, p. 325.]

On the contrary it is shown that in the lease of 1865, they limit the Bowmans to the northern boundary of the lease of 1864, and by their superintendent, they gave notice not to interfere with complainants' workings.

The injunction therefore as to them is refused, but as to O. O. Bowman and Jonas Bowman and those claiming under them.

Injunction granted.

Court of Common Pleas, Venango County.

THE COUNTY OF VENANGO vs. JAMESTOWN AND FRANKLIN RAILROAD COMPANY.

1. Judicial authority has settled that a railroad is not real estate within the intentment of the tax laws, and its depots, places to hold cars, and other places and buildings indispensably necessary to the construction of the road, are incident to it, parts of it, and not separately taxable as real estate.
2. There being no legislation authorizing the assessment of county rates upon railroads or parts thereof, the lot, repair shop, turn table and round house of the company cannot be assessed for such purposes.

Opinion delivered *December 23, 1874*, by

TRUNKY, P. J.—The defendant, incorporated in 1862, owns and occupies a lot of ground in Oil City, upon which are located a repair shop, turn table and round house, all used by defendant in operating its railroad. For the year 1874 said lot and building are valued at \$4,000 and assessed with \$22 county tax and \$6 poor tax.

*The act of March 9, 1872, P. L. 298, authorizes the poor taxes in Venango county to be assessed upon the same subjects as county rates.

The act of April 15, 1834, makes taxable real estate, viz.: "All houses, lots of ground," etc., and personal estate, viz.: "All horses, mares, gelding and cattle, above the age of four years." P. L. 1834, 512. The act of April 29, 1844, P. L. 497-8, makes taxable all real estate, to wit: houses, lands, etc., and all other real estate not exempt by law from taxation; also personal estate, to wit: (enumerating many articles), "together with all other things now taxable by the laws of this commonwealth."

Are the lot, repair shop, turn table and round house subject to assessment for county rates? None of them are enumerated among the items of personal property liable to assessment. It has not been contended that they are liable as personal estate. It was argued that they are real estate and taxable as such, although railroads are not enumerated in any act of assembly as a subject of taxation. Plaintiff's counsel contends: 1. That the act of April 8, 1873, P. L. 64, makes all real estate liable to taxation. 2. That the act of May 18, 1874, P. L. 158, makes all property, real and personal, not exempted in said act, subject to taxation. 3. That section 1, article 9, of the constitution, requires all taxes to be uniform, and section 2 makes void all laws exempting property from taxation other than what is enumerated in section 1, and consequently all real estate is taxable.

[*Original Edition, p. 326.]

Under the act of 1799, P. L. 70, "all lands held by patent, warrant, location or improvement, houses and lots of ground," were made taxable. In the case of the President, etc., of the *Permanent Bridge vs. Fraily*, 13 S. & R. 422, the only question was whether the bridge over the river Schuylkill was an object of taxation for county rates. The court held it was not. Tilghman, C. J., said: "In order to make the Schuylkill bridge an object of taxation, it must be shown to fall within the list of enumerated articles. It certainly is property, and very valuable property, but of what nature? It is neither land, house nor lot But the question is whether they (bridges) are subject to the county tax by the existing law. They certainly are not expressly enumerated, and I think it equally certain that we ought not to include them in the list of assessable articles by a strained construction. Our legislature is convened annually, and whenever it shall be satisfied that it is for the public good to impose a tax on bridges, roads or other works of that nature, to which the right of demanding toll is annexed, it will be done in such manner as, under all circumstances, shall be judged proper."

This decision, made half a century ago, has been frequently cited and applied when like questions have arisen upon subsequent similar statutes. It settled that the terms "lands," "houses," or "lots of ground," did not include a public bridge erected by a company authorized to collect tolls. The principle would apply to many other things, as turnpikes, canals, gas works and railroads.

Accordingly it was decided that the bed, beam-bank, and tow-path of an incorporated canal, and the toll-houses and collectors' offices belonging to the canal and incident thereto, are not taxable as land or real estate under the acts of April 15, 1834, and April 29, 1844. The lands, houses, and lots of ground intended to be made taxable by the legislature, were such as formed the principal part of that which was designed to be charged and taxed, and not merely such things as were necessary to something else which everybody regarded as the principal. A canal is a species of property, and as such may be made taxable; but few, if any, would consider it as property designated by either of the terms "lands," "houses," or "lots of ground," or even by all of these terms put together. Lock-houses and collectors' houses are necessary to make a canal answer the purposes of its construction: *Lehigh Coal & Nav. Co. vs. Northampton Co.*, 8 W. & S. 334.

Exemption from taxation, or immunities to corporations, will not be carried beyond the principles settled in *L. C. & Nav. Co. vs. Northampton County*, but these principles are applicable to railroads. But there is a wide difference between things appurtenant and convenient to a railroad and things appurtenant and part of a canal. A railroad corporation may necessarily employ many agents, who occupy houses and grounds to transact their legitimate business. It may be desirable and convenient that the company own extensive warehouses, coal-yards, board-yards, coal-schutes, and machine-shops at many points and places on the road. But these erections and conveniences form no part of the road. They are only indispensable to the profits to be made by the company, and are legitimate sub-

[* *Original Edition*, p. 327.]

jects of taxation within the act of 1844. Depots, water-stations, offices, oil-houses, and places to hold cars, and such buildings and places as may fairly be deemed necessary and indispensable to the construction of the road are not within the act: *Railroad vs. Berks Co.*, 6 Barr, 70.

It was said by Rogers, J., that the rulings in the *Northampton County Case*, 8 W. & S. 336, and in the *Berks County Case*, 6 Barr, 70, have been acquiesced in by the legislature as the true construction of the acts of April 15, 1834, and April 29, 1844. The construction of the acts was a question for the courts. No person was ever so absurd as to suppose that a canal passing through several counties was a subject of taxation for county purposes. The incident followed the principle, and part was of the same nature of the whole; and held that a toll-house so built as to be occupied as a collector's office and his family residence, *subject to taxation, is that they are not enumerated in the acts of assembly imposing taxes, and therefore come within the principles of the leading case: *Bridge Comp. vs. Frailly*. The court seems to have been impressed that had the legislature intended a tax should be assessed upon a bridge, turnpike, canal or railroad, constructed by a corporation for public use, they would have said so. No legislative enactment exempted them from taxation; they were not taxable, because there was no such enactment for taxing them.

The act of 1844 subjected to taxation all real estate, to wit, "houses, lands, lots of ground . . . and all other real estate not exempt by law from taxation." This language is as comprehensive as that used in the act of April 8, 1873. The latter provides "that all real estate within the commonwealth shall be liable to taxation for all such purposes as now is or hereafter may be provided by general laws, exempting therefrom the classes of property." This act was for repeal of exemption laws. It is observable that real estate is not made taxable for any purpose only as provided by some other general law. Nothing is declared real estate which was not before that time held to be such. No fair construction of the act of 1873, entitled "an act to repeal all laws exempting real estate from taxation," will effect the prior decisions of the Supreme Court upon the laws authorizing the taxation of real estate.

The act of May 14, 1874, exempts certain property from taxation, and does nothing else. It was enacted in pursuance of section 1, article 9, of the constitution. The proviso relates to property not in actual use and occupation for the purposes of exemption. It makes nothing liable to taxation, which is not liable under some former act, when not taken out by an exempting statute. This act and proviso, as a whole, only exempts, as the title imports, therefore it is unnecessary to say that if any part authorized taxation, it would be a violation of section 3, article 3, of the constitution.

Judicial authority, binding upon this court, has settled that a railroad is not real estate within the intendment of the tax laws, and its depots, places to hold cars, and other places and buildings indispensably necessary to the construction of the road, are incident to it, parts of it, and not separately taxable as real estate. There is no

[*Original Edition, p. 328.]

general law authorizing the assessment of county rates upon railroads or parts thereof. Without question of the power of the legislature to enact such a law, and that nothing in defendant's charter prevents it being made liable, is, notwithstanding such residence, a constituent part of the canal, and cannot be assessed for taxation under the acts of 1834 and 1844: *Schuylkill Nav. Co. vs. Berks Co.*, 1 Jones, 202.

Other cases of like import might be cited. In all, the chief reason for the decision that canals, railroads, and other like property are not *under such law, until its enactment, the road, as an entirety or in parcel, cannot be assessed for county rates. When the legislature shall make this class of property taxable for such purposes, it must be by general law and uniform tax. In the absence of legislation to that end section 1, of article 9, of the constitution, does not impose a tax upon railroads for county purposes.

The turn-table and round-house for sheltering the cars clearly are incident to and parts of the road. The repair-shop is convenient, but like a machine-shop not indispensably necessary, and is not a part of the road. Perhaps in this case it is of such a character as not to be an object of separate assessment. It may be trifling, a mere addition to the round-house, and not a structure for general repairs. However this may be upon the case stated, being of opinion that so much of the lot as is occupied by the turn-table and round-house is not subject to county and poor rates, judgment must be entered for defendant.

Endorsed December 23, 1875. Judgment for defendant. By the court.

NOTE.—The case stated shows no separate assessment of the repair-shop, or separate tax thereon, nor what proportion is chargeable thereto.

Court of Common Pleas, Juniata County.

COMMONWEALTH vs. JOHN CONWAY.

The coaling of locomotives, engaged in transporting live stock, on Sunday, being a work of necessity and charity, is excusable.

Opinion delivered by

JUNKIN, P. J.—The defendant was convicted under the act of April 22, 1874, for performing worldly employment on Sunday, and the record is before us on certiorari. The worldly employment consisted in coaling locomotives at Patterson Station, Juniata county, on the 26th of July, 1874, and which locomotives were drawing trains of cars loaded with live stock, cattle, hogs, etc. The trains had left Pittsburgh on the afternoon of Saturday, and had reached Patterson on the morning of the 26th, where arrangements exist for coaling engines, and defendant was an employee of the railroad company.

It is shown very clearly that stock trains cannot lie by for twenty-four hours without serious injury to the stock, there being no provision for feeding and watering within the cars, and the motion of

[*Original Edition, p. 329.]

the train is in itself diversion and relief (by arresting attention) to the animals, as they are not nearly so restive as when the train is standing.

It is also shown that no stock-yards exist at Patterson capable of accommodating a train load of cattle, and that none short of Harrisburg do; that to deliver them into fields for watering and feeding would require *a large force of men, and occupy much time, and generally cannot be done at all. Here, then, we have the conditions under which this worldly labor was performed; over two thousand head of live stock, in cars, could not be fed, could not be watered, could not even lie down, without food or drink since Saturday noon, with no yards at Patterson capable of holding them, and no force to handle them, with no chance of relief until Harrisburg was reached; under these circumstances the defendant coaled the engines which were speeding these brutes to relief and rest, and he is sued for the penalty prescribed by the Sunday act of 1794. Should or can he be made liable under the circumstances? We think not, and might rest this opinion on the statement of the facts alone. He did not start the trains nor order them to run; he found them there, recognized the necessity of their running on, until a point could be reached where this suffering mass of animal life could be relieved, and his labor in coaling the engines in no wise differed from the recognized duty of pulling the ox out of the pit on the Sabbath day. What he did is covered both by necessity and charity.

The common law is silent as to the observance of Sunday—the English people exercised worldly callings on that day, but much of the day was given to games and pastimes, and this continued until after the Reformation. Plays were performed on that day at the Court of Elizabeth and Charles I. The first restrictive statute was the 27th, Henry VI., c. 5, which forbid fairs and markets, except the four Sundays in harvest. The 1, Charles I., c. 1, forbid sports and games, and the 3, Charles I., c. 1, forbid carriers, wagonmen and drovers traveling, and butchers from killing; the 29th, Charles II., c. 7, forbid the exercise of worldly labor, business, or work of ordinary callings on the Lord's day (works of necessity and charity only excepted), and section 3 allowed the dressing of meat in families, in inns, cook-shops and victualing houses, and crying milk before nine, and after four o'clock.

The framers of the act of 1794, when excepting works of "necessity and charity," without defining the words themselves, saw plainly that they were using terms which, in the distant future, would meet the advance of the race, the changed conditions of the people, and cover acts unavoidable in their new relations. Indeed, lest too rigid a construction might be given to the words in their own day, remembering that under the Mosaic law, not even a fire could be kindled on the Sabbath day, Exodus xxxv., 3, the act expressly sanctions the dressing of victuals in private and public houses, the ferrying of passengers, and the delivery of milk before nine o'clock, A. M., and after five, P. M., showing how liberal were their views of the necessity of some things. Even then they well knew that furnaces,

[*Original Edition, p. 330.]

glass-works and many other industrial pursuits could not be entirely suspended on the Sabbath day, and these have *gone on without question ever since. The word necessity in its comprehensive signification, meets all the unavoidable requirements of the present advanced age. Had the ancient lawmakers been permitted to see the future (they had only a prophetic vision of coming time), and realized a graded iron road from ocean to ocean, with its tens of thousands of vehicles, and its ponderous engines passing with tireless energy, night and day, with miles and miles of valuable products *en route* for the great centres of trade, with armies of travelers at every point of the great thoroughfare, is it to be supposed that they would have asked this stream of life and trade to halt at the dead hour of midnight, wherever found, and wait until the Sunday passed, when they themselves refused to forego milk and dressed victuals? But they have done all that could be expected, or even asked, when they excepted works of necessity and charity, terms broad enough to meet all the contingencies that may ever arise in the history of the race. What the defendant did was both a necessity and charity, and like the lock-tender in *Commonwealth vs. Murray*, 12 Harris, 290, who opened the gates to permit the travelers to pass on their way, and was held guiltless before the law, so here, the coaling of the engines permitted the suffering animals to pass to relief and safety; a work of both necessity and charity, and he is excused.

Court of Common Pleas, Dauphin County.

MAYOR AND MORGAN vs. KIRBY.

A contract was entered into between K. and N. for building a house for a certain sum, and whilst it was in course of erection it was blown down. K. then promised N. that if he would rebuild the house and complete it, he should be paid three hundred dollars additional. *Held* that the contract was without consideration, and he could not recover the three hundred dollars.

Exceptions to an auditor's report. Opinion by

PEARSON, P. J.—After a careful scrutiny of the auditor's report, we think that he has properly disposed of every question before him, with one exception—the effect of Kirby's promise to pay Novioch, the builder, three hundred dollars for reconstructing the house. On the 13th day of November, 1866, the parties, Kirby and Novioch, entered into a written contract by which the latter agreed to build for the former a dwelling-house of particular description, and to complete the work by the first of April next following, Kirby to pay therefor the sum of \$1,520, seven hundred and fifty dollars when the house was under roof, and the remainder in full when *it was completely finished. On the 29th of March the building was blown down by a storm of considerable violence. Whether the fall was occasioned by the want of foundation walls or the violence of the tempest is uncertain. Novioch himself proves that it would have been much safer had the walls been completed. From our view of the case, that question is unimportant, as the contractor must bear the loss under the contract, whether

occasioned by the act of God, or his own carelessness. The house was not completed when it fell, and it is very manifest from the amount of work necessary to its completion, that it could not have been finished by the first of April, or for a considerable time after. That is not, however, the turning point of this cause.

This contract was an entirety, and Novioch could not entitle himself to compensation or be relieved from damages, except by the entire construction of the building, for although he was entitled to be paid a portion when it was in part completed, yet he remained bound to see it finished, and if not done, although his work was destroyed by the act of God, he would have to re-erect it, or subject himself to an action, and at least refund the money paid. It may be considered a pretty well settled doctrine of the law, that if it becomes impossible to perform a contract on account of some unforeseen contingency, the party promising must respond in damages, for he should have provided against it in making his bargain: Addison on Contracts, 1123-4; as where the party contracted to ship a certain quantity of grain from a specified place, and there was none there: 16 East, 201; 3 M. & S. 267; 15 M. & W. 261, or the exportation was prohibited by the government. So where a man had covenanted to raise a certain amount of coal annually from a mine, or pay a specified annual rent, it was no answer to the contract to show that coal was exhausted: *Butts vs. Thompson*, 13 M. & W. 487. So when a quantity of stones were to be transported between certain points, and the water became too low to carry by boat, for the contractor must provide other means: *Trulings vs. Craig*, Addison's R. 342.

All of these contingencies should have been foreseen and provided against in the contract. Says Parsons on Contracts, 2 Vol. 673, and where, from the acts of God, the contract cannot be literally performed, if it can substantially, it must be done: 2 Parsons on Contracts, 672; Addison on Contracts, 1124. And performance is not excused: 26 Maine R. 361. To make the act of God a defence to the performance, it must amount to an impossibility, mere hardship or difficulty will not suffice: 2 Parsons, 672, and note of cases cited. *Gilpin vs. Consequa*, 1 Peters' C. C. R. 86. See also, 2 Parsons on Contracts, first edition, pp. 184, 185 and 186, and notes *w* and *z*. In the present case the act of God might and would excuse the performance within the time specified, as that is not of the essence of the contract, yet it should be performed *cy pres* as *soon after the first of April as practicable. Impossibility might excuse the delay. The very nature of the subject shows that the contract was an entirety. No one contracts to build half a house, although he may agree to pay as the work progresses. Taking it then as settled that Novioch was bound to complete this work as soon as practicable, was there any consideration for Kirby's promise to pay him the three hundred dollars for performing his contract? Where a specific sum is fixed as the price of goods sold and delivered, or an agreed remuneration for work and services, a subsequent promise, without any new consideration, to pay an additional sum for the same work or services is a *nudum pactum*: Addison on Con-

[*Original Edition, p. 333.]

tracts, p. 13, see Peake R. 102; 1 Marsh, 567; 3 Bos. & Pul. 612. So an agreement to discharge a debt on receiving a part thereof: Addison on C. p. 14; See 12 John, 426; 2 Hall, 185; 1 Ad. & Ellis, 113; 1 Smith's Leading Cases, 147 and notes; 5 Bing. N. C. 351, 356.

So if the debtor be bound to give up the deeds of an estate, an agreement with a purchaser to deliver them for a consideration is void: Pothier, p. 25; Addison on C. 14; 7 M. & W. 641. So the promise to pay the men of a vessel for working at the pumps in time of a storm, because bound to labor to save the ship: Addison, p. 14. And where the crew was shipped from London to Melbourne and back, at £3 per month, the promise to pay those of the men who remained on board £6 per month for the return voyage, the most of them having deserted at Melbourne, was held to be without consideration, they being bound by contract to perform their duty: 3 Ellis & Bl. 359 (77 Eng. C. L. R. 558).

So a promise to a sheriff in consideration that he would serve a writ, or to a witness if he would attend court, for it is the duty of each to perform for the legal fees: Addison, 14; 8 M. & W. 797. And the voluntary restoration of that which the law will compel a man to restore, is not sufficient consideration for a contract: 2 Conn. 140. No mere voluntary courtesy is sufficient consideration: Addison, p. 12; 5 B. & C. 501; 1 Sid. 413; Hob. 105. In short, the performance of any act which the party is under a legal obligation to perform, cannot constitute a good consideration for a promise: Addison, 14; 2 Conn. 139; 2 Selden, N. Y. 369; 11 Vermont, 166.

In the present case Novioch was bound by his contract to build the house, and the promise by Kirby to pay him three hundred dollars additional for doing that which he was obliged to do, was merely gratuitous, was without consideration, and therefore not a binding contract.

The auditor, however, treats it as the compromise of a doubtful right, and therefore obligatory. There can be no doubt but that the compromise of a doubtful right is sufficient consideration for a contract: *1 Ark. 10; 1 Vermont, 4; S. C. 2 Vermont, 363. And it need not appear that there was an actual controversy or difficulty, it is sufficient that the parties thought at the time that there was a question between them, the issue of which might fairly be considered by both parties as doubtful: 1 Parsons on Contracts, 439.

It is sufficient that there was the supposition of a right, for the right must always be on the one side or the other.

It need not be shown to be a valid claim, for if that had to be proved the controversy would have to be settled. Such is not the test. It is sufficient that the party yielded to his adversary the right to contest the point: 12 Wend. 381-2. But ceasing to make complaints or bore or annoy is insufficient. Add. 13.

These principles are extremely broad, and go very far towards supporting compromises of rights about which there is any doubt. Had the auditor found in express terms that the parties had entered into the compromise of a right considered or treated as doubtful this court might have felt itself bound by the finding; but we do not so understand the report. It merely assumes as a

[*Original Edition, p. 334.]

legal principle that such a settlement would amount to a sufficient consideration for a contract, without finding the fact in express terms, and when we look into the evidence we can find nothing to show that the parties treated the right as doubtful, or that Novioch ever claimed additional compensation on that ground. Take his own language and it proves no compromise. All that he says is "the same day it blew down I went to Donaldson to see Kirby, and see if he would help to bear the loss. It was too great for a new beginner. I saw him and he said he would see me in a few days. He did see me and we talked it over and he agreed to pay me \$300, and clear me of all damages as far as the original contract was concerned. He was to pay me \$300, in addition to the original contract paid \$1,520. I then went on to build on this promise, and did rebuild it. I furnished the materials and the work, sufficient to cover the \$300. It went into the house and the rebuilding. I then filed the lien." In the course of his last cross-examination he says: "I felt bound to go on to complete the contract if I had not had a subsequent arrangement." He was unquestionably so bound, and could not have been relieved by anything short of a release. All that is proved against Kirby amounts to nothing more than a mere voluntary promise to pay Novioch an additional sum for performing his contract, which he was bound to do without the gratuity, for it was nothing more. The money was not claimed as a right. It was not agreed to be given as a compromise. We cannot say in such a case that Kirby got his house built by reason of the promise, for he was entitled to have it under his contract. Novioch claimed the additional sum, not as a right, but because he was poor, "a new beginner," and could not *afford to bear the loss. However, this court might feel disposed to divide the loss between the parties, or hold Kirby to his promise, as a matter of honor, we cannot enforce it as a matter of law, especially against the creditors of Kirby, who will lose a portion of their debts, if this promise is fulfilled. Unless additional evidence is laid before the auditor, we feel constrained to declare the agreement to have been made without consideration, and consequently void. The case is referred back to the auditor to make a new distribution of the money in court, according to the principles laid down in this opinion, but with liberty to take additional evidence if offered, and to be governed in his decision by the whole of the evidence.

Note.—An appeal was taken to the Supreme Court in this case, but the counsel of appellant, being satisfied that the law was as decided, abandoned the case.

Court of Common Pleas, Schuylkill County.

KELLY vs. STEPHENS.

In a proceeding under the act of April 13, 1807, relating to stray cattle, want of notice to the owner of the stray, will work a forfeiture of all damages.

Certiorari. Opinion delivered September 28, 1874, by

GREEN, J.—This proceeding, though somewhat in form like an ordinary action of trespass for damages to real estate before a jus-

[*Original Edition, p. 335.]

tice, is evidently intended as a proceeding under the act of April 13, 1807, relating to stray cattle. The exceptions filed are evidently based upon the idea that the proceeding is an action of trespass for damages. The first exception sets forth that the justice had no jurisdiction, it being an action of trespass for damages. But if it had been an action of trespass for damages to real or personal property the justice would have had jurisdiction. This is given by the act of March 22, 1814: Purdon's Dig. Vol. 1, p. 867, pl. 119. The second exception set forth that the proceeding is based on a warrant of arrest and not on a summons, giving defendant but one day's notice of the hearing. As the defendant was not arrested on the warrant and was not present on the day of hearing, and as the record does not set forth any other notice to the defendant except that "the cow aforesaid (being defendant's cow) was in possession of Michael Kelly, the plaintiff," this objection is fatal to the proceeding as an action of trespass for damages, even though more than twenty days had elapsed from the rendition of the judgment to the issuing of the *certiorari*: **Fitzgibbens vs. Essen*, Com. Pl. Phila.; *Benedict vs. Hickok*, 3 Luz. Leg. Obs. 80. See also *Laycock vs. White*, 7 Harris, 498; *Daily vs. Bartholomew*, 1 Ashmead, 135; *Offerman vs. Downey*, 2 Wh. Dig. 134, pl. 278.

But upon the argument of the case, whilst it was admitted that this proceeding could not be sustained as an action of trespass for damages, it was urged that it was evidently a proceeding under the act of April 13, 1807, relating to the taking up of stray cattle, and, as such, good and valid. Is it a valid proceeding under that act?

Before proceeding under that act, it is an indispensable prerequisite that notice of the taking up of stray cattle be given to the owner, if known, and if he can be readily found, in order that he may have opportunity of tendering amends. If reasonable satisfaction is not tendered, then the proceedings before the justice may be instituted. Vide Sec. 3d of the act. But in the present case no notice was given to the owner, so far as appears, but the proceedings were immediately instituted before the justice, and the warrant against him was issued. He was not arrested on the warrant, and did not appear at all before the magistrate. In the case of *Vandamayer vs. Wood*, 1 Ash. 203, which was a case similar to the present one, Judge King decides: "Neglect to give notice to the owner of the stray, when known, works a forfeiture of all damages, and entitles the owner to the stray detained, without recompense to the party injured." "In such case notice should have been given to the owner, in order to have given her an opportunity of tendering amends. From the magistrate's transcript it does not sufficiently appear that such notice was given previous to the complaint to the justice."

This is decisive of the present case. Had the defendant been brought before the magistrate or appeared there, and then allowed more than twenty days to elapse after the judgment, before issuing the *certiorari*, he would probably have been too late to avail himself of the irregularities of the proceeding. But such is not the

fact. He was not arrested, he was not present at the hearing, and there is no proof of any notice to him of any hearing.

The judgment is reversed and the proceedings quashed.

***Court of Common Pleas, Schuylkill County.**

LIPPINCOTT *et al.* for the use of WILLIAM VERNER vs. THE MINE HILL & SCHUYLKILL HAVEN R. R. Co.

1. When a verdict is taken subject to a reserved point, the verdict should be for the plaintiff.
2. Where a railroad company agreed with the landowners, over whose land the road crossed, that in consideration of paying no damage for the right of way, the landholders might remove all coal beneath the road-bed, the landlords to first give written notice to the company when they were ready to move the coal, at which time the company were to either change the route, or secure the road from damage—such an agreement is not illegal or against public policy so as to relieve the company from the obligation of performing their contract.
3. The landowners will not be permitted to mine out all coal beneath a railroad so as to endanger the travelling public.
4. The owner of the surface has a right to subjacent supports, but this may be qualified by his conveyance.
5. Railroads are private corporations.
6. Previous to the act of April 11, 1862, a railroad company having once selected the location of their road could not change it against the consent of the owner of the land, for the exercise of eminent domain being derogatory to private right the authority must be strictly construed. But the company might change with the consent of the landowner.

Rule to show cause why the verdict in the above case should not be set aside and the judgment entered for the defendant *non obstante verdicto*. Opinion delivered *January 25, 1875*, by

WALKER, J.—On the trial of this case the defendants in their third point requested the court to instruct the jury as follows:

That by the grant of the right of way to the Minehill and Schuylkill Haven railroad company, across the Catharine Groh tract, the right to subjacent support of said way passed to said company as an incident, and if the agreement of February 20, 1855, was intended to permit the landlords or their tenants to mine out the coal so near to the surface as to remove such supports, and cause the railway bed to fall in, the agreement would be in such respect repugnant to the grant of the right of way, against the policy of the law, and void, and the verdict should be for the defendants.

The court declined to instruct the jury as requested, and sealed a bill of exceptions, but reserved the question of law embraced therein for future consideration, and the verdict being for the plaintiffs, the court directed the above rule to be entered, which on the 22d of December was ably argued at length before a full court of all the judges.

By the 5th section of the act of March 28, 1835 (Pur. Dig. 497, *pl. 21; P. L. 90), any one of the judges of the District Court of Philadelphia may reserve questions of law for the consideration and judgment of all the judges of the said court sitting together: 1 Troubat & Haly, 588. And by the act of April 22, 1863, P. L. 554, the right of entering judgments on reserved points is extended to the Courts of Common Pleas of the several counties of this com-

[*Original Edition, pp. 337 and 338.]

monwealth: Pur. Dig. 1168, pl. 28. But when the verdict is taken subject to a reserved question the verdict should be for the plaintiff: *Robinson vs. Myers*, 17 P. F. S. 18. A reservation can only be of a pure question of law, and the facts should be found by a jury or agreed upon: *Campbell vs. O'Neill*, 14 P. F. S. 290; *Ferguson vs. Wright*, 11 P. F. S. 258. And the reserved question must be such as to rule the case: *Wilde vs. Trainor*, 9 P. F. S. 439.

An affirmative answer to the defendants' third point denies the entire right of the plaintiffs to recover in this action. As the plaintiffs have doubted the right of the court to enter the above rule, in a case like the present one, we have referred to these authorities to sustain our action.

Under the terms of the defendants' charter, and the general railroad act of February 19, 1849 (Pur. Dig. 1219, pl. 35), before the defendants could enter upon or take possession of any land for the railroad, they are required to make ample compensation to the owner or owners of the land, or tender adequate security therefor.

In their agreement of February 20, 1855, the defendants, in consideration of not paying damages for the right of way, covenanted with the landlords, Dundas & Richardson, that they might mine out all coal beneath the road, as though the railroad had not been constructed, and that when they or their tenants were ready to mine such coal, they should give written notice, and the railroad company would take proper measures to *adjust, secure, and maintain* their road, or *change* its location. The material question is *whether the reservation is repugnant to the grant.*

To support this position it is urged:

1. That a change of the road is unauthorized by law.

2. That the safety of the public and the exercise of the chartered rights of the company demand that the road-bed should not be undetermined or endangered, and, therefore, an agreement to do that is against public policy.

It should be borne in mind that the right of a railroad company is only to occupy the land, and is an *easement*, not an *interest*, in the land: *Western R. R. Co. vs. Johnson*, 9 P. F. S. 290; *Big Mountain Imp. Co. Appeal*, 4 P. F. S. 861, and cases cited. There can be no doubt that the owner of coal land over which a railroad passes will not be *permitted to work out all the coal beneath the road-bed, so as to cause the ground to subside, and thus jeopardize the lives of travellers.

When that has been attempted to be done this court has restrained the working by injunction.

In the case of the *Philadelphia and Reading R. R. Co. vs. Verner*, and of same plaintiff vs. *Lawrence, Merkle & Co.*, it was done by this court, and we think properly so. But the question here is as to the liability of the defendants upon their contract.

Of course if it is against public policy, or illegal, or if it is rendered impossible by the act of the law, or by the act of God, it is void, and there can be no recovery by virtue of it, but it would be otherwise if occasioned by accident or some unforeseen circumstance: Addison on Contracts, 1123-4; 2 Parsons on Contracts, 186-7; 6

[*Original Edition, p. 339.]

Dana, 366; *Hatzfield vs. Gulden*, 7 Watts, 152; *Mayor of Norwich vs. Norfolk R. R. Co.*, 20 Eng. Law & Eq. 120; *Clippenger vs. Hepbaugh*, 5 W. & S. 315.

By the terms of the agreement the defendants were required to secure or change their road when the coal was to be removed. They contend that their power was exhausted when they located their track, and they had no authority by law afterwards to change it, and therefore that part of the contract was illegal, and they rely upon the following authorities: *Marrow vs. Common*, 12 Wr. 305; *Holden vs. Cole*, 1 Barr, 308; *McMartrie vs. Stewart*, 9 H. 322; *Furness vs. Furness*, 5 C. 15. But all these cases refer to public highways under the general road law, and in our opinion do not apply to railroads.

Without doubt the defendants under their charter would not be permitted, previous to the 11th of April, 1862, P. L. 498, after locating their road to change it. As against the owner of the land their power was exhausted, for as the exercise of eminent domain is derogatory of private right, the authority must be strictly construed.

But where the company own the land, or act with the consent of the owner, we see no substantial reason why this change should not be made when it is required for public safety. In *Hopkins vs. The Great Northern R. R. Co.*, Godefroi & Shortt's Law of Railway Companies, 326. Excessive lateral deviation was not restrained by injunction where it appeared that the plaintiff was cognizant of the fact and acquiesced in it.

As to the second objection:

In Pennsylvania there may be two estates in land, one vested in the owner of the surface of the ground, and the other in the owner of the minerals below the surface: *Caldwell vs. Fulton*, 7 Casey, 488. The owner of the surface takes it subject to subjacent supports, unless otherwise provided for in the title deeds.

Subjacent supports are incident to the use and enjoyment of the surface, and the owner of the minerals has a servient right, and is *required, in working his mines, to leave sufficient pillars to support the surface. He is obliged to use his property so as to injure his neighbor as little as possible. *Sic utere tuo ut alienum non laedas* is the general rule: *Harris vs. Ryding*, 5 M. & W. 60; *Earl of Glasgow vs. The Alum Co.*, 8 Eng. Law and Eq. Rep. 13; *Humphries vs. Brogden*, 1 Eng. Law and Eq. 241; *Caledonia Railway Co. vs. Sprout*, 39 Eng. Law and Eq. 16; *Same Plaintiff vs. Balhaven*, 40 Eng. Law and Eq. 1; *Rodgers on Mines*, 200-1, 459-60; *Washburne on Easements*, 478-9.* And this is the law upon this subject, *unless it be* controlled by the conveyance: *Jones vs. Wagner*, 16 P. F. S. 434; *Smart vs. Morton*, 30 Eng. Law and Eq. Rep. 385.

In *Rowbotham vs. Wilson*, 30 Eng. Law & Eq. 236, it is held that the owner of the surface of the ground may have only a qualified right of support from the minerals, if it is so expressed in the deed.

And if the owner working the minerals, in an approved manner, cause the ground to subside, the owner of the surface has no claim of damages against him. It is *damnum absque injuria*.

[*Original Edition, p. 340.]

This is conceded to be the law with reference to individuals, but it is urged that it does not apply to a railroad company, having public duties to perform.

This leads us to inquire whether there be any difference between a private individual and a railroad company, in a case like the present as to the performance of their contracts. Corporations are either public or private.

Generally speaking public corporations are towns, cities, counties and parishes existing for public purposes. Private corporations are, banks, insurance, roads, canals, bridges or when the stock is owned by individuals, but their use may be public: *Dartmouth College vs. Woodward*, 4 Wheat. 664; 2 Kent's Com. 222. Angell and Ames on Corporations, § 14.

Railroads are private corporations. Angell and Ames on Corporations, § 31: *Bonaparte vs. Camden & Amboy R. R. Co.*, 1 Baldwin, 205; *Alabama R. R. Co. vs. Kidd*, 29 Al. Rep. 221.

If this company be a private corporation as these authorities appear to show then it is difficult to understand why they should be released from an obligation that would certainly bind a private individual.

Is the defendants' contract to adjust, secure and maintain their road illegal by reason of impossibility of performance?

In England, under the canal act, the owner of minerals is prohibited from working them within twelve yards of a canal, without notice, and by another clause of the same act, three months' notice is required to be given to the company to inspect the mines and pay for the coal left to support the canal.

*When such notice was given and the company failed to inspect the mines or pay for the coal it was decided that the lessee might work out the coal, and would not be responsible for damages for subsidence to the company, if it was done in a workmanlike manner: *Dudley Canal Navigation Co. vs. Grazebrook*, 20 Eng. Com. Law, 344.

Under the English consolidated railway act of 1845, the same privilege is given to the owner to remove the coal under the bed of the road after notice and failure of the company to purchase. Godefroi & Shortt, Law of Railway Companies, 387, § 78. See also *Wysley Canal Co. vs. Bradley*, 7 East. 368.

The contract of the 20th of February, 1855, clearly shows that both parties contemplated the removal of all the coal beneath the road bed, in consideration of the damages of the right of way over the land, and we were asked in defendants' 3d point to say, as a pure question of law that this contract was void, and that, without reference to the evidence, whether the road could be easily secured, or whether it was impossible to secure it.

Will it be contended, if the evidence had established that the road could have been made safe, without any difficulty and with very little expense, that we would have been justified in affirming this point? Is not the feasibility and possibility of securing and maintaining the road a question wholly for the jury upon which they could not pass if we had directed a verdict for the defendants?

[*Original Edition, p. 341.]

Could we say that the contract was void, without reference to its impossibility?

We see no reason why the defendants if they did not wish to change their route by the consent of the landowners, could not have adjusted, secured and maintained their road either by filling up the holes or bridging over the crops of veins. It was a question wholly of expense (of great expense, no doubt), not of impossibility.

If the performance of the covenants was more costly than had been contemplated when the contract was made, it furnishes no sufficient reason why a party should be relieved from a bad bargain. It is not a question of public policy, for the public interests are in no way concerned in the expense of the company's contracts. We are all clearly of the opinion that the court was right in declining to affirm the defendants' third point.

Therefore the rule *non obstante veridicto* is discharged.

***Court of Common Pleas, Lancaster County.**

McPHERSON, ADM., vs. McPHERSON.

A party, when sued, may appear in court in person and waive service, or he may employ counsel to enter an appearance for him, and in either case service by sheriff is dispensed with. Where, however, a sheriff, in whose hands a summons is placed for service, prevails upon an attorney (who was in no way authorized) to accept service for the defendant and judgment by award of arbitrators is obtained against said defendant who was not served with summons, the award and judgment will be set aside.

The fact that the attorney notified the defendant by letter of the acceptance of service does not alter the case.

Rule to strike off award of arbitrators. Opinion delivered by LIVINGSTON, J.—The summons in this case was issued September 6, 1873, and service accepted by D. W. Patterson, Esq., September 8, 1873.

Application to refer entered by plaintiff's counsel, September 11, 1873, and served September 12, 1873, on D. W. Patterson, Esq., attorney.

Arbitrators were chosen by plaintiff's counsel and James R. Patterson, Esq., who attended for his father, D. W. Patterson, Esq.

The arbitrators met on October 18, 1873, and made an award in favor of plaintiff for \$3,500. On December 8, 1873, a *fi. fa.* was issued and defendant's personal property levied on, and on December 17, 1873, the defendant filed an affidavit upon which the *fi. fa.* was stayed, and the present rule to show cause why the award of the arbitrators should not be stricken off was granted.

The testimony presented to the court shows clearly and free from all doubt that there was no service of summons upon William McPherson, the defendant.

That D. W. Patterson, Esq., the attorney who accepted service, was not employed by the defendant as counsel for him; that he never was authorized to accept or waive service for defendant, or to act as his counsel in this cause, nor had he any authority, either general or special, to appear as counsel for defendant in any case.

[*Original Edition, p. 342.]

That it was at the instance and urgent solicitation of the sheriff, whose duty it was to serve the summons, that D. W. Patterson, Esq., accepted service, the sheriff stating that he had not time to go down and make the service upon the defendant.

That Col. Patterson then wrote to the defendant stating that he had accepted service, and asking him if he was the person sued. That after the application to refer was served upon him, he again wrote to defendant informing him thereof, and wrote to him also after the award (two of the letters having been received by William McPherson, the defendant). That defendant took no notice of the letters, never recognized Mr. *Patterson as his attorney, nor recognized, nor ratified any of his acts as such. That Mr. Patterson finding that defendant did not answer his letters, nor recognize him as his counsel on the day of arbitration, went before the arbitrators, and gave notice to them, as well as plaintiff's counsel, how and why he had accepted service, and that McPherson, the defendant, never had sanctioned nor approved his action in this case, and then withdrew from the case, and that after being thus notified, plaintiff's counsel proceeded with the case, and presented their testimony to the arbitrators, who made an award in favor of plaintiff as above stated.

Now, what had William McPherson, the defendant, to do with these proceedings, or any of them? Was he before the court? What was done to bring him within its jurisdiction?

Our acts of assembly prescribe four methods of serving a summons.

1st. By reading the writ in the hearing of the defendant.

2d. By making the contents thereof known to the defendant, and giving him a true and attested copy of the writ.

3d. By leaving a true and attested copy at defendant's dwelling house, in presence of and with an adult member of his family. And,

4th. Where a defendant resides in the family of another, by leaving a true and attested copy at the house where he resides, with an adult member of the family in which he resides.

And if the sheriff had simply performed his duty, and served the summons, or if issued too late, returned it "*tarda venit*," instead of going about importuning and insisting upon a member of the bar to accept service for the defendant, and relieve him of the performance of this duty, and, at the same time, enable him to pocket the fees and mileage for a service, and the counsel applied to had not intermeddled, where he had not been spoken to, nor employed, and apparently attempted to push himself into the cause for the purpose of causing the defendant to employ him, we should not have been called upon to consider the question now before the court. But we must take the case as presented to us.

A defendant may if he see proper, when sued, appear in court in person, and waive service, or he may employ counsel to enter an appearance for him, and in either case, service by sheriff is dispensed with. But the case before us presents a different aspect. A summons was regularly issued and placed in the hands of the sheriff for service, who, instead of serving it, prevailed upon an at-

[*Original Edition, p. 343.]

torney (who was in no way authorized), for his own ease, convenience and accommodation, to accept service for the defendant, and in consequence of this improper action on the part of the sheriff and counsel, a judgment has been obtained by *arbitration against a defendant, who has never been served with a summons nor legally before the court. This award or judgment we are now asked to set aside.

The question has been ably argued by counsel, and many cases have been cited. Upon full examination, however, it will be found that but few of them have a direct bearing upon the present case. In 9 Paige, 496, the chancellor found that the counsel had sufficient authority from the officers of the bank not only to make his acts binding, but also to protect him against any claim for damages by reason of his action in the case.

In 2 Har. & Gill. it is said that the appearance of an attorney without proof of authority derived from a defendant does not, *per se*, invalidate the judgment. But in that case it appears that the defendant appeared in court voluntarily and that subsequently judgment was entered against him by default on his failure to plead.

In 5 Har. & Johns. judgment was properly entered against the defendant. Garnishees were summoned, who appeared by counsel and who pleaded "*nulla bona*." At the trial plaintiff read in evidence certain written certificates which were admitted by the garnishees to be in their handwriting, stating that at the time of the laying of the attachment they had funds belonging to defendant and that they had never authorized any one to appear for them to contest the same. The court refused to strike off the appearance of counsel on plaintiff's request, and the counsel appeared in and tried the cause.

In 2 Md. Chan. Rep. 143 the court held that the authority of counsel, received from a portion of the members of the board of trustees of a church, was sufficient and refused to dismiss the bill filed by him.

In 1 Tyler, 300, the counsel had been retained by one of the defendants, and no testimony was offered to show that he had not been properly retained for all.

In 1 Blackford the defendants were sued as partners, and the names of all the defendants frequently appear on record as being before the court in person, and it was not even suggested that the attorney had not authority to enter an appearance for all the defendants.

In 9 Wend. 494, it is said when a suit against several defendants is commenced by declaration the proceedings will not be set aside, although the declaration was served on all, if an attorney has appeared and put in a plea for all. In this case there was no pretence that counsel had not been regularly employed to appear for all the parties sued.

In 7 Pick. the attorney, though not formally employed at the time he signed the demurrer, was afterwards employed, and then wanted to undo what he had previously done, and the court refused to permit him to do so.

[*Original Edition, p. 344.]

*In 1 Binn. 214, there was no evidence that the attorney was not authorized to enter an appearance for both defendants. It was merely argued from the fact that the return of the sheriff, as to one, was *nil*, and there was no power of attorney on file; that, therefore, the attorney was not authorized to appear for the one not served. And in the same book, 469, the defendant had employed, recognized and consulted with the attorney.

In 2 Binn. 245, the attorney was employed in the cause by one party and entered an appearance generally. The court held that he must be presumed to appear for both.

In 2 Yeates, 546, it is said: The act of an attorney binds his client. In that case there was a motion to set aside a judgment entered in an amicable action. The defendant made affidavit that he had never employed the attorney to enter the amicable action. One of the plaintiffs made a counter affidavit, stating that defendant had told him that he had spoken to the attorney to enter the action. The court, in consequence of these conflicting affidavits, allowed the judgment to remain as a lien, but permitted the defendant to contest the plaintiff's demand in point of law.

In 6 Howard, 163, where a citizen of Virginia sued in the Circuit Court of Louisiana two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri was held to be at liberty to show that the appearance for him was unauthorized, and if he could do so, he was not bound by the proceedings of the court, whose judgment as to him is a nullity.

In 10 Har. 195, there was an attempt to inquire into the regularity of the judgment in a collateral proceeding, and in such case the court say: "If it is confessed by an attorney it is conclusive of his authority," and say further that as between the original parties, "Where an attorney appears without authority and confesses judgment, the remedy is against him, or, in a proper case, application may be made to open the judgment."

And in *Campbell vs. Kent*, 3 Penna. Rep. 72, it was held that a judgment confessed by an attorney-at-law, by authority of a warrant from the wife of an absent debtor is void as to subsequent judgment creditors, even though ratified and confirmed by the debtor, after the entry of other judgments against him; and further that "Whatever may be done upon application to the court by a party to be relieved from a void or voidable judgment, the same result may be obtained upon the application of a *bona fide* creditor of such party." Judge Gibson dissenting.

We find, therefore, that there has not been a single case cited by the learned counsel, nor reported so far as we have been able to discover, bearing the slightest resemblance to the present, in which the judgment *has not been opened, or set aside, and the defendant allowed to make his defence. Certainly not one in which the defendant, as in this case, has sworn and proved that the attorney had no authority to appear for him, and that he believes he has a just and legal defence to the whole of plaintiff's claim.

But we are told, and authorities are cited to show, that the judg-

[*Original Edition, pp. 345 and 346.]

ment should be permitted to stand, because Mr. Patterson, the attorney who appeared and who now swears that he acted without authority, is personally responsible and able pecuniarily to respond in damages to the defendant, his assumed client. That it is only where the attorney appearing and acting without authority is too poor to respond in damages, or is a suspicious character, that the court should interfere and strike off an award or open a judgment. An argument and doctrine which appear to be as false in principle as they certainly must and would be pernicious in practice.

But it is argued that Mr. Patterson is a respectable member of this bar, and that by permitting him to practice we recommend him to public confidence. Grant it in its fullest and broadest sense, and what does the admission prove? Can a stream rise higher than its source or fountain head? Did this court, could it, confer a power upon him when he was admitted to practice law which it could not itself wield or exercise? Has this court power to order or direct an appearance to be entered by any of its attorneys or officers for a defendant against whom a suit has been brought and upon whom the sheriff is too indolent to serve the writ? Certainly not, and if not, how can an attorney be said to have done, under an authority conferred upon him by the court when he was admitted, that which the court could in no emergency order to be done?

Who ever supposed or believed that when the court admits an attorney to practice law within its jurisdiction it confers upon him authority to do that which is unlawful, to enter an appearance in any and every suit brought, without being retained or authorized by the defendant, and says to him, we will hold such an act valid whether the party sued be willing to employ him or not, and whether authorized or not, his act shall equally bind a defendant? A mere statement of such proposition shows its absurdity. Judge McLean, in 6 Howard, 163, takes what we conceive to be a proper view of the matter when he says: "The evidence relative to the appearance of counsel does not contradict the record, but explains it, the appearance was the act of counsel and not the act of the court." "The appearance by counsel who had no authority to waive process or defend the suit may be explained." "An appearance by counsel under such circumstances to the prejudice of a party subjects the counsel to damages, but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no principle which can afford him adequate protection."

And Judge Huston in 3 Penna. Rep. 76, in speaking of the stress laid on the fact that the attorney was of good character and responsible in point of property says, "How can that alter the case? How long will an attorney be responsible in property, who adopts such a practice?" "When is his responsibility to be tested, or how? If this conduct is sanctioned, there is an end of all distinction between bonds with warrant to confess judgment and common bonds. Nay, every common demand. No man can, however careful and methodical, know how to arrange his business, or know when to look for an execution." In that case judgment was set aside, and even

[*Original Edition, p. 347.]

Judge Gibson, who dissented, adhering to the old doctrine that the interposition of the court is to be invoked only in the last resort, as where the attorney is not of sufficient estate to answer the consequences in an action of damages, says in his opinion, that "a judgment rendered without a semblance of authority, may be set aside on motion, and due consideration of the circumstances."

Again, it is argued that this judgment should be allowed to stand, in order to protect the innocent plaintiff.

How can he be more innocent than the defendant, who has never been served with the process of the court, nor brought within its jurisdiction, who has never had his day in court? He was not obliged to pay any attention to, or answer the letters of an attorney he never employed, nor from those letters take notice that an action was brought against him. The first legal notice he had of a suit against him, was when the sheriff came with an execution to levy on his property.

He is as innocent as the plaintiff, and as much entitled to protection. Why, then, should he be compelled to bring his action against the attorney, rather than the plaintiff?

But in this case plaintiff and his counsel knew before they obtained the award and judgment, that there had been no service on the defendant, and that the attorney who appeared for him did so without authority, and that defendant had refused to recognize him as his counsel, or ratify his acceptance and appearance, and knowing this, obtained the award and issued execution upon it. The legislature of Pennsylvania, with a view, no doubt, of breaking up and destroying the very pernicious and unprofessional practice of attorneys entering appearances without being retained or employed, and without authority, and appearances *d. b. c.*, which now seem to mean, I will be his counsel, provided 1st, That he wishes counsel, and 2d, That he employs me, has placed it in the power of every litigant to know whether the attorney representing his adversary, is authorized to do so or not, by enacting the 71st section of the act of April 14, 1834, which declares that "the attorney for the plaintiff, in *every action shall, if required, file his warrant of attorney in the office of the prothonotary, or clerk of the court in which such action shall be depending, at the term of the court in which he declares; and the attorney for the defendant shall, if required, file in like manner, his warrant of attorney at the term of the court in which he appears."

The great weight of authority shows that the award of arbitrators and judgment in this case being improperly obtained, should be set aside and the defendant be permitted to enter his plea, and make his defence to the action, and if there were no authorities nor precedents on the subject, every principle of equity and justice demands that no judgment so obtained should be permitted to stand. We therefore set aside the award and allow the defendant to enter an appearance and plead to the action.

Orphans' Court, Schuylkill County.**ESTATE OF WILLIAM WILLIAMS, late of the Township of Blythe.**

An administratrix sold and assigned a judgment which was good and collectable, for the amount of the principal alone and failed to show that she did so in good faith and under the belief that she was doing the best for the estate. *Held*, that she should be charged with the full value of the judgment, principal and interest, at the time of the transfer.

In the matter of the exceptions filed to the account of Sarah Williams, deceased. Opinion delivered by

GREEN, J.—The facts in this case have been agreed upon and raise the question whether the administratrix should be charged with the interest upon a certain judgment in favor of the estate against the township of Blythe, she having sold and assigned the judgment to David Whitehouse for the amount of the principal alone, with the exception of one hundred dollars of the judgment which had been previously assigned to Wesley Dodson in payment of a debt of the estate owing to him. The interest upon the judgment up to the time of the assignment amounted to \$261.34. The exceptants seek to surcharge the administratrix with this amount. If the administratrix had shown that she had sold this judgment in good faith and at its full value, or at less than its full value, acting under a belief that she was doing the best for the estate, I do not think she could be legally chargeable with this interest. But the case stated simply sets forth that this judgment was sold by her for the amount of the principal, and further that the whole of the judgment against Blythe Township "was good and collectable, and that the same was collected and satisfaction entered of record since the day it *was assigned by the said administratrix." Without more, it seems clear that she should be charged with the whole amount of the judgment, both principal and interest. As the judgment was good and collectable at the time of the transfer, it is fair to presume in the absence of anything to the contrary, that its market value was not less than the amount of the judgment and interest, and that the administratrix should not have sold it for less. The burden would fall then upon her to explain why the claim was thus seemingly sacrificed. In the absence of any reasonable explanation she should be charged with the full amount of the judgment and interest. Under some circumstances we think the administratrix would have a right to sell for less than the debt, interest and costs; but under the facts agreed upon in the case stated, we do not think she would have such right. The accountant should therefore be charged with the whole amount of judgment and interest, and should only be credited with the additional sum of one hundred dollars for professional services paid to C. Little, in collecting the judgment as agreed upon in the case stated. The account as thus corrected will then be as follows:

[* *Original Edition*, p. 349.]

Balance due administratrix as appears by her account filed	\$1,559 21
Additional credit, per C. Little	100 00
	<hr/>
The account is surcharged as follows:	1,659 21
Judgment vs. Blythe Township	1,523 93
Interest on same	261 34
Amount received per J. Russel, as appears by the depositions taken	500 00
Amount received per Russel for timber	10 00
	<hr/>
	\$2,295 27

Balance due the estate by the administratrix is therefore six hundred and thirty-six 8-100 dollars.

Court of Common Pleas, Schuylkill County.

McCULLOUGH & Co. vs. THORNTON.

When an inquisition has been held, and the defendant's land condemned, a judgment creditor, who has levied upon the same land under a *fi. fa.*, may issue his *ven. ex.*, and sell without another inquisition.

Rule to show cause why the execution should not be set aside. Opinion delivered November 30, 1874, by

WALKER, J.—A rule to set aside this is asked on the ground that no inquisition was held in the present case. The sheriff's return shows that the defendant's real estate was levied on and condemned, as per inquisition annexed to *fi. fa.*, No. 104, June Term, 1874, and this is a matter *in pais*. (18 P. F. S. 9.)

*Under the 44th section of the act of June 16, 1836, relative to executions (Pur. Dig. 646, Pl. 55), the sale of real estate, as a general rule of law, without inquisition, or waiver of inquisition, is wholly unauthorized and such sale is void: *Gardner vs. Sisk*, 4 P. F. S. 506; *St. Bartholomew's Church vs. Wood*, 11 P. F. S. 96.

But when an inquisition has been held and land condemned on other executions, a judgment creditor who has levied upon the same land under a *fi. fa.* may issue his *ven. ex.*, and sell the land without holding another inquisition. There is no occasion to go to the expense of several executions: *McCormick vs. Meason*, 1 S. & R. 98-100, per Tilghman, C. J., and Yentes and Breckenridge, J. J., 1 Troubat and Haly Prac., p. 992; *Wray vs. Miller*. 8 H. 115, per Woodward, J.

The rule is therefore discharged.

Court of Common Pleas, Schuylkill County.

YUENGLING vs. THE COUNTY COMMISSIONERS.

Mandamus will not lie where there is an adequate remedy at law.

The court will not restrain by mandamus an alleged illegal increase of assessment of property for taxable purposes, the act of assembly of May 10, 1871, providing a full and adequate remedy by appeal.

Opinion delivered January 25, 1875, by

GREEN, J.—This is a proceeding by petition for a mandamus against the defendants to compel them to reduce the assessments

of certain property owned by the complainant from one hundred thousand dollars to sixty thousand dollars. This is asked for upon the ground that the property had been assessed at the latter amount, of which the complainant had notice, and that upon the day of hearing appeals from assessments, the commissioners had raised the valuation to an hundred thousand dollars, without notice to him, and after their authority to revise had been already exercised, and was therefore exhausted.

The question that meets us at the very threshold of this case is whether the complainant has chosen his proper remedy. It is clear that if he has an ample remedy at law, then the writ of mandamus must be denied him. This is familiar law (several authorities cited).

Has the complainant a remedy at law? The defendants contend that he has, and that the act of assembly, passed May 10, 1871, Pamphlet Laws of 1871, page 665, gives him a specific and adequate remedy, and that this remedy being provided by statute, must be pursued, and no other. The act of 1806 enacts whenever a remedy is provided or a duty enjoined, or anything is to be done by an act of assembly, the directions *of the act shall be strictly pursued. The act of 1871 provides "that any freeholders of the county of Schuylkill, etc., or owner of property in said counties, who may feel aggrieved by any assessment of the property of such freeholder or owner, and be dissatisfied with the decision of the commissioners of the county upon an appeal made to them from the said assessment, may appeal from the decision of the said commissioners to the Court of Common Pleas of said county, and for that purpose may present to the said court at the next term thereof after the said commissioners shall have informed such freeholder or owner of their decision, a petition setting forth the facts of the case," and then, after due notice to the commissioners, the court, upon hearing, may either affirm or reduce the assessment complained of.

The complainant contends that the act does not make provision for his case because he did not feel aggrieved by the assessment of his property, and made no appeal to the commissioners of the county, and that the act of the commissioners in raising the assessment was not based upon an appeal to them, but was arbitrary, and *ultra vires*, and that therefore he has no other remedy except by mandamus.

If this case were one of first impression there might be some doubt whether the act of 1871 did apply to a case where no appeal from the assessment as fixed by the assessor had been made to the commissioners. But under the decisions made in *Kimber vs. Schuylkill County* and *Silver vs. The same*, 8 Harris, 366 and 369, and *Hughes vs. Kline et al.*, 6 Casey, 227, I think that there can be no doubt that the complainant may avail himself of the remedy of appeal provided by the act of 1871, just cited, and that therefore the remedy of mandamus will not lie. In the cases of *Kimber and Silver vs. The County of Schuylkill*, the undisputed facts of the case were an assessment of lands by the assessor, with which the owners were satisfied, a day of appeal fixed which they did not attend,

[* *Original Edition*, p. 351.]

after the day of appeal a raising of the assessment of the land by the commissioners, without notice of the owners, and after a demand for the payment of tax by the tax-collector, which was the first notice the owners had of the increased assessment, an appeal by the owners to the Court of Common Pleas, under an act of assembly passed April 26, 1850, Pamphlet Laws, 1850, p. 627-8. The appeal was dismissed and the case carried to the Supreme Court. The facts in these cases show the exercise of a more arbitrary power than in the present case, the first notice of the increased assessment in them being the demand of the tax-collector for his taxes. It was decided that the party had his remedy by appeal under the act of 1850, and instead of dismissing an appeal taken in time the Court of Common Pleas was ordered to proceed and to hear and finally determine the case. The appeal being thus reinstated in the court below, it was heard and the assessment made *by the commissioners was sustained. Subsequently when the attempt was made to collect the taxes by selling the land at tax sale, Hughes, alienee of Silver, filed a bill in equity, asking for an injunction to prevent the sale on account of the alleged illegal assessment by the commissioners. The court below granted the injunction, but the Supreme Court reversed the decision of the court below. This was done upon the ground that the complainant's remedy was by appeal under the act of 1850, and that all other remedies were taken away. Says Judge Thompson in this case, delivering the opinion of the court: "interrogatories being specially put, their answers exhibited the fact of the original assessment, that no objection was made to it by the owners; that the assessment was raised by the county commissioners, etc. Upon bill and answer then the case went before the court. There is no allegation in the bill that the land was not subject to taxation. The complaint was as to the amount of taxes, and to get rid of that, the manner of assessment was objected to. The Common Pleas had jurisdiction of all this under the act of 1850; they heard the case upon these allegations, and their decision was final and conclusive on the appellees in this case." Further on it is said: "Wherever this power of revision of assessments is reposed, its action is to be final and conclusive, whether it be the act of a court specially authorized or that of the county commissioners. To such tribunals constituted for the purpose, parties dissatisfied on account of excessive taxation must appeal. The act of 1806 enacts that whenever a remedy is provided or a duty enjoined or anything is to be done by any act of assembly, the direction of the acts shall be strictly pursued. The bill in equity in this we think, contravenes these provisions. It does not complain of want of jurisdiction in the officers to levy and assess taxes on the lands in question, or that these lands were not the subject of taxation and liable to be sold for taxes, but against the regularity by raising the valuation, and the consequent increase of the taxes. This was within the jurisdiction of the Common Pleas, and if the remedy for correction had been attempted by bill in equity in the first instance it would have availed nothing, as the court would have had no jurisdiction for the purpose sought to be

[*Original Edition, p. 352.]

obtained by this bill, there being a special remedy by statute: " *Hughes vs. Kline et al.*, 6 Casey, 227.

In these cases it is very evident that the proper remedy was by appeal under the act of 1850. But there is no essential difference between the act of 1850 and the act of 1871. The one is almost a literal transcript of the other. The act of 1850 provides "that any freeholder of the county of Schuylkill, or owner of property in said county, who may feel aggrieved by the assessment of the property of such freeholder or owner, and be dissatisfied with the decision of the commissioners of the county upon an appeal to them made from the said assessment, may *appeal from the decision of the said commissioners to the Court of Common Pleas of said county, and for that purpose may present to the court, etc.," a petition, etc. If the decisions of the Supreme Court which we have cited are to stand, it necessarily follows that the remedy by mandamus will not lie in this case, but that the proper remedy is the one prescribed by the act of assembly of 1871, and that therefore this petition must be dismissed, and the mandamus refused, at the costs of the complainant.

District Court of Allegheny County.

LONG & MCKINNEY for use of C. S. FETTERMAN vs. WOOD *et al.*

Where a lease contains a covenant that if the rent is not paid at a specified time it shall work a forfeiture of the lease, and the landlord may forthwith enter and take possession, the non-payment of the rent does not make the lease absolutely null and void, but only voidable at the election of the landlord.

When a landlord, with knowledge of the forfeiture, receives rent falling due after that, it is a waiver of the forfeiture; but not so if the rent was due before the forfeiture.

Under the terms of such a lease, if a landlord proceeds by a landlord's warrant and collects the rent, it is then too late to declare a forfeiture and take possession. If, however, he declared a forfeiture and took possession before, or simultaneously with, the issue of the warrant, the payment of the rent on the warrant would not restore the right of possession to the lessee.

If, through the artifice or trick of the landlord or his agent to enable him to declare a forfeiture, the lessee was induced not to pay the rent within the specified time, it was bad faith—a fraud—on the part of the landlord, and he had no right to take advantage of the delay to declare a forfeiture for the non-payment of rent due.

In an action for breach of covenant for quiet enjoyment the burden of proving a sub-letting on the part of a lessee in violation of his covenant, rests upon the defendant. The lessee's consent to proceedings upon the part of a third party to procure a right of way through the premises, is not a sub-letting.

The word "coal" in this lease construed to have been used in its mercantile sense and not to include nut-coal or slack.

The measure of damages for ouster is the marketable value of the lease at the time of the ouster.

Charge to the jury *January 24, 1875, by*

WHITE, J.—By articles of agreement, dated September 1, 1869, the defendants "demised and leased" unto Robert Long and J. N. McKinney, partners, doing business as Long & McKinney, certain coal mines, rights and privileges in Chartiers and Union townships of this county for the period of five years from September 1, 1869. Long & McKinney, as partners, worked the mines until about September, 1871, when Long sold his interest to McKinney and retired.

[*Original Edition, p. 353.]

McKinney then *carried on the works in his own name until July 8, 1872, when he was dispossessed by the defendants. A few months after that McKinney was put in bankruptcy, and C. S. Fetterman, Esq., appointed his assignee. The assignee brings this action for the breach of the implied covenant of quiet enjoyment, to recover damages from the defendants for their alleged violation of that covenant by wrongfully evicting McKinney.

The material parts of the lease, so far as this action is concerned, are the following:

1. The lessors are James T. Wood, Charles A. Wood, and Benjamin B. Reath, as trustees under the last will and testament of James Wood, deceased, and also in their own right and as attorneys in fact of Hannah Wood, widow of James Wood, deceased. The lessees are Robert Long and J. N. McKinney, partners, doing business as Long & McKinney.

2. The demised premises were "the coal mines of the late James Wood, deceased, situate in Chartiers and Union townships, Allegheny county, Pennsylvania, with the right to mine and remove the coal in and under" certain tracts of land therein described, with certain specified surface and mining privileges. Also the personal property of the lessors then used in and about said coal mines, viz: fourteen coal cars, one large and small pump, boilers, fire front and pipes attached to the same, "together with all other personal property of the said parties of the first part, being in or about or used in connection with said mines, which said personal property is to be kept in good working order and repair" by the lessees.

3. The lessees to pay a royalty or rent of seventy-five cents for each one hundred bushels of coal taken out by them, to be paid semi-monthly on the 1st and 15th of each month, during the term of five years, from September 1, 1869, to September 1, 1874.

4. "The quantity of coal so taken out shall be determined by the books of the Little Saw Mill Run Railroad Company, or by the books of the diggers employed in the said mines, at the option of the lessors." The lessees were to furnish to the lessors for their inspection the books of the diggers on the 1st and 15th of each month, if they should be required so to do, and, if requested, they were to furnish a written statement, under oath, of the amount of coal taken out between any two periods of time. They were bound to take out at least 2,500 bushels per day during the continuance of the lease, or pay the semi-monthly rent on that amount.

5. The lessees were to work the mines skillfully, and "at all times obey the directions of the" lessors or their agent, "in regard to the driving of entries, opening rooms, etc."—the lessors having the right to enter at all times for inspection, and to "direct where entries shall be driven, and from what part of the land the coal shall be first mined and removed."

6. *In case the lessees "should neglect or refuse to pay any instalment of rent on the day it shall fall due, and the said rent shall remain due and unpaid for a period of five days, or in case the lessees should continue to violate any of the covenants and conditions in this lease contained, after five days' notice in writing of such vio-

[*Original Edition, pp. 354 and 355.]

lation given to them by the lessors, then the lessors, if they elect so to do, may declare this lease forfeited and void, and proceed forthwith to take possession of the demised premises," provided, however, that this clause should not affect or impair any other right or remedy of the lessors.

7. "All buildings, erections, and fixtures placed upon the surface of the premises" by the lessees, were to remain at the expiration of the lease, and become the property of the lessors.

8. The lessees were not to sub-let the premises, or any part thereof, or assign the lease, without the written consent of the lessors; and if they did, the lessors might, at their option, declare the lease forfeited and void, and forthwith resume possession of the demised premises.

9. At the expiration of the lease the lessees were to surrender peaceable possession "of the mines, and appurtenances, and personal property" therein enumerated "in good working order, condition, and repair."

Long & McKinney, and after their dissolution McKinney, continued to pay their rent regularly until the 1st of July, 1872. A large part of the coal they mined was delivered to the rolling mill of James Wood & Co. That firm consisted of James T. Wood and Charles A. Wood (two of the defendants) and James W. Friend. The firm had an office in the city of Pittsburgh. The custom was for the Little Saw Mill Railroad Company to give a statement semi-monthly of the amount of coal transported over their road, which McKinney took to the office of James Wood & Co., with a statement made out by himself or his clerk, of the amount of coal mined on which the royalty or rent was to be paid, and gave these statements to the clerk of James Wood & Co. The clerk deducted the freight due to the railroad company and also the tonnage tax, which the firm settled with the railroad company, and prepared two checks of the firm, one for the rent due the estate, and one for the balance due McKinney for the coal delivered to the firm. He sometimes gave both checks to McKinney, and sometimes retained the check for the rent and handed it over to Mr. Neeley, who was the clerk of the estate and had his office in an adjoining room. When McKinney got the check he handed it over to Neeley. This statement made by McKinney was also handed over to Neeley. This had been the custom ever since McKinney had been carrying on the works by himself, and for some time previous under Long & McKinney. When McKinney called to settle as usual, on the 3d of July, 1872, for the last two weeks of June, the clerk of James Wood & Co. refused to settle the rent, saying that he had been instructed not to settle it, or give a check as he had been in the habit of doing, but, after deducting the freight and deducting the balance due on an old debt of Long's, which McKinney had assumed, gave him one check for the entire balance due McKinney. McKinney wanted him to deduct the rent, but he refused to do so because of his instructions. No further explanation of the matter was given by the clerk, except that he could settle the rent himself.

On the 8th day of the month (July, 1872), the defendants issued

[* *Original Edition*, p. 356.]

a landlord's warrant for rent due July 1, \$199.41, and the constable levied upon the cars, mules, etc., at the mines. On the evening of that day the amount was paid to the constable and by him handed over to defendants, and received and receipted for by them, or by James W. Friend for them. On the same day or the next, July 9, by directions of James T. Wood and James W. Friend, two police officers took possession of the mines and prevented McKinney and his men from entering or working them. It was alleged that McKinney had forfeited his lease, and possession was taken in behalf of the lessors. The police officers remained there some six weeks, under instructions from Wood and Friend not to let McKinney or his men enter. McKinney, through F. C. Negley, tried to get possession again but failed. In December following, the defendants sold the demised premises to Gray & Bell, made a deed therefor, and gave them possession.

The ouster of McKinney by the defendants is established by the testimony, and not really controverted. But defendants justify on the ground that McKinney had forfeited his lease, and they had a right to enter and take possession. They allege three grounds of forfeiture:

1. The non-payment of the semi-monthly rent due July 1, 1872, for a period of more than five days; being due on the 1st, and remaining unpaid till the 8th, when they issued their landlord's warrant.
2. That McKinney had sub-let a part of the premises to F. C. Negley, in violation of his contract.
3. That he had neglected or refused to pay rent on the nut coal and slack taken from the mines.

Where the lease, as in this case, contains a covenant that, if the rent be not paid at a specified time, it shall be a forfeiture of the lease and the landlord may forthwith enter and take possession, the non-payment of the rent does not make the lease absolutely null and void, but voidable at the election of the landlord. He may insist upon the forfeiture and put the tenant out; or he may waive the forfeiture, hold the tenant to his lease for the whole term and make him pay the rent. Where a landlord, with knowledge of the forfeiture, receives rent falling due after that, it is considered in law a waiver of the forfeiture; but not so if the *rent was due before the forfeiture. These forfeitures are in the nature of a penalty, and frequently work great hardships. The courts, therefore, construe them strictly against the party exacting the forfeiture. But nevertheless, when they are so "nominated in the bond," and the claimant acts in good faith, and the delinquent has been guilty of a plain violation of his covenant, the courts will enforce them. Under the covenants of this lease the defendants had a right, if a semi-monthly installment of rent remained due and unpaid for a space of five days, to declare the lease forfeited, and to enter and take possession of the premises; and also to issue their landlord's warrant for the collection of the rent then due and unpaid: for the proviso to the covenant gives them this right. But the defendants were bound to act fairly and in good faith towards their tenant. When the for-

[*Original Edition, p. 357.]

feiture had taken place they had an election to insist upon it or waive it. If they did not choose to declare a forfeiture, but proceeded to collect the rent by a landlord's warrant, after thus collecting their rent, they could not then declare the forfeiture and proceed to take possession. The landlord's warrant in this case was issued on the 8th of July, 1872, for \$199.41, due on the first day of that month. It was paid to a constable and receipted for on the same day. There is some conflict of testimony as to the day when the defendants took possession, whether on the 8th or 9th of the month. If they declared the forfeiture and took possession before, or simultaneously with, the issue of the warrant, the payment of the rent on the warrant would not, under the covenant of this lease, restore the right of possession to McKinney. But if the forfeiture was an after-thought, after collecting the rent, and after receiving full satisfaction, it was too late for the defendants to say they would elect to treat the non-payment of the rent as a forfeiture. The issuing of the warrant and collecting the money without declaring the forfeiture was an election to treat McKinney still as their tenant.

But on this point another question arises. It is contended by the plaintiff's counsel, that McKinney was ready and willing to pay the rent due July 1, at the settlement with James Wood & Co., on the 3d, as had been the custom during his whole tenancy; and that he was induced not to pay it through the artifice and trick of the defendants, or their agent. You will remember the testimony bearing on this question; the manner in which the rent has always been settled; the fact that two of these defendants were members of that firm; that McKinney was required to pay the whole balance of the old claim against Long; that the firm of James Wood & Co. were still receiving coal and were indebted for that; what McKinney, Beltzhoover and Friend say on the subject; the fact that the warrant was issued only five days after that; and all the other circumstances in the case. If you believe from the evidence that it was a *plan of the defendants or their agent to entrap McKinney, to throw him off his guard, to induce him to defer payment so that five days would elapse to enable them to declare a forfeiture, then it was bad faith on the part of defendants—a fraud upon McKinney—and they had no right to take advantage of that delay, and no right on the 8th or 9th of July to declare a forfeiture for the non-payment of the rent due July 1.

The second ground of defence is, that McKinney had sub-let a part of the premises to F. C. Negley in violation of his covenant, in which there is also a clause of forfeiture, with the right of defendants "to forthwith resume possession." To constitute a breach of this covenant there must have been an actual sub-letting—sub-leasing—of a part of the demised premises. Any binding agreement giving Negley an absolute right to use a part of the demised premises, in derogation of the rights of the lessors, would be a sub-letting. The defendants allege there was a sub-letting and set it up as a justification for their ouster of McKinney. The burden of proving it is upon them. It is not sufficient to raise a suspicion

[*Original Edition, p. 358.]

that there was some improper agreement with Negley. The defendants must prove it to your satisfaction. It is not disputed that Negley sought to get a right of way through these mines. There was nothing wrong in that. He applied to the Woods on the subject and had commenced proceedings in court to obtain the right of way under the lateral railroad law. There was nothing wrong in that—nothing that should prejudice McKinney's rights. Even if McKinney had given his consent to such proceedings, that would not be a sub-letting or a violation of his covenant. A good deal has been said on this subject, and the defendants' counsel have called your attention to all the testimony bearing upon it.

Does the evidence satisfy you there was an actual sub-letting? It is not for the plaintiff to prove there was not; it is for the defendants to prove there was; to prove the terms and extent of the alleged sub-letting, or agreement, at least so far as to satisfy you that it was a violation of McKinney's covenant. Have they done so? I leave that question for you to determine. If they have the plaintiff cannot recover.

The third ground of defence is, that McKinney had neglected or refused to pay the rent on nut coal and slack. The terms of the lease are, that the lessees should pay a royalty or rent of 75 cents "for each and every 100 bushels of coal taken out by them," from the demised premises. It seems from the testimony that the coal taken out from the mines is divided into three classes: coal proper, otherwise called lump coal, nut coal and slack. The first is the common mercantile article, that passes over the screens at the mines: nut coal is the small lumps sifted from the screenings, and slack, the dust remaining. The diggers are *paid according to the quantity of lump coal, what passes over the screens, no account being taken of the nut, or slack. Formerly the screenings were considered worthless and thrown away. Lately, however, the nut coal has been separated from the dust, and has become quite an article of trade. There is also some demand and sale for the slack. The nut coal is about one-fifth as much as the lump coal, and the slack about one-half as much as the nut coal. The average prices of sales made by McKinney, delivered at the river, were, for lump coal about 7½ cents per bushel, for nut coal about 3½, and for slack about 1½ cents per bushel. From the commencement of this lease, Long & McKinney, and McKinney after Long went out, returned only the lump coal and paid rent on that alone. No question ever arose on the subject between the parties during the continuance of the lease. The defendants allege they never knew until within two or three months past that McKinney was not paying on the nut and slack, but supposed he was. They now claim that his neglect to pay the royalty on nut and slack was a forfeiture of his lease, and they have a right now to set it up as a bar to the plaintiff's recovery in this action, or at least to have the rent on the same set-off against the claim for damages. This raises a question as to the construction of the lease, or what is the true meaning of the word "coal" in the lease. Generally the construction of written agreements is with the court. When words are uncertain or have different meanings, or

[*Original Edition, p. 359.]

are used in a technical sense, evidence may be received to explain them, and it may sometimes be a question of fact to be decided by a jury, as to what the word is, or in what sense it was used. Whenever the evidence is conflicting it must be referred to the jury. In this case there is no conflict of testimony, and both parties, plaintiff and defendants, have presented points requiring the court to give a construction of the lease in this particular.

In its general sense undoubtedly the word "coal" embraces all kinds of coal, of every variety and quality, from the most valuable down to the most worthless. In its mercantile sense, the sense in which it is used in the trade and business, the word, when not qualified by an adjective, means the article commonly used as fuel. In which sense is the word used in this lease? As we have no other evidence on the subject, we must decide this question from a careful reading of the whole lease, in the light of surrounding circumstances, and by the interpretation of the word given by the acts of the parties.

The rent reserved is 75 cents "for each and every one hundred bushels," one price only, and by fair implication applying to one kind only. The quantity of coal on which the rent was to be paid, was to be determined, at the option of the lessors, from the books of the diggers, *or from the books of the railroad that took the coal to market. This option is not a choice between two different things, but a choice as to the method of ascertaining the same thing or fact; the two sets of books are supposed to give the same information. The choice is supposed to be a matter of indifference to the other party. As the diggers' books were under the entire control of the lessees, the lessors reserved the right to take the books of the railroad company, as a check upon the lessees, and a security that they would make correct returns from the diggers' book. Now it is a fact in evidence and a fact well known that the diggers are paid according to the coal that passes over the screen, and their books contain only the number of bushels of that kind, that is, of lump coal, the common merchantable article. They get no pay for the slack or nut coal, and their books contain no account of such. It is in evidence also that the nut coal is sifted from the screenings, and is not half as valuable as the lump coal; and then the slack scarcely pays for transportation, and is often thrown away in large quantities as utterly worthless. It is unreasonable to suppose that the parties intended a royalty or rent should be paid upon this, equal to the rent upon the best quality. Several of the witnesses spoke of the nut and slack as the refuse of the mines; in their calculations of the value of the lease, they counted only the sales of lump coal, regarding what was realized from nut and slack as incidental savings, which might be considered in estimating the expenses. In the testimony of all the witnesses, perhaps without exception, where they used the word "coal" without any qualification, they referred to the mercantile article, or lump coal. It was invariably so when speaking of the price of coal, of the price paid for digging, of the number of bushels mined, and of the number of bushels in an acre. It would seem from the mortgage given by

[*Original Edition, p. 360.]

Gray, that this was the sense in which the defendants used the word when they subsequently sold this coal to him. The acts of the parties under this lease confirm this view of the case. When the lease was made, September 1, 1869, there was a screen at the mines, the same that was used by James Wood in his lifetime, and it was used by McKinney all the time he had possession. The defendants knew this fact, and it is fair to presume they knew the custom in reference to diggers' prices and books. They knew also that McKinney was selling nut coal, for the firm of James Wood & Co. was regularly getting both lump and nut coal from him, paying 6.95 for lump and 3.20 for nut. The firm also every two weeks was getting a statement from McKinney of the number of bushels mined, and from the railroad company the number of bushels transported. The statement of the railroad company contained two items of transportation, one of which as the clerk testifies, was the number of bushels of lump coal and the other of nut and slack. A comparison of these statements would have shown *that McKinney did not return as much as was transported, but that his returns correspond with the bushels of lump coal. They had a right to call for diggers' books, or to call for a statement under oath, or to take the books of the railroad company, yet they took the statement of McKinney without objection and settled according to it semi-monthly. It is true the defendants, or some of them, testify that they did not know there was any difference in the statements and supposed that McKinney was paying on all. But it was their duty and the duty of their agents, to look into the matter, and when they had the two statements in their hands it is singular that they did not examine them. But whatever their actual knowledge may have been, their acts are a practical sanction of McKinney's course. They were entirely satisfied with it. There can be no doubt that McKinney acted according to his understanding of the lease in returning only the lump coal. And there is no allegation, or at least no evidence, that he did not make correct returns according to the diggers' books.

I am, therefore, of the opinion that the word "coal" in this lease is used in its mercantile sense, and does not include nut coal or slack. I so instruct you, and say that the non-payment of the rent on nut coal and slack was not a forfeiture of this lease, nor can defendants claim any set-off for the same against the plaintiff's damages, if you should find for the plaintiff.

Two questions of fact are submitted to you: 1st. Was the neglect of McKinney to pay the rent due July 1, 1872, induced by the plan, trick or device of the defendants, or either of them, or any agent of them? and

2d. Was there any sub-letting of a part of the demised premises by McKinney to F. C. Negley?

If you find that there was no such plan, trick or device, or that there was such a sub-letting, then the plaintiff cannot recover. But if you find there was such a plan, trick or device, and that there was no sub-letting to Negley, in the sense in which I have explained that word, then the plaintiff is entitled to your verdict, and the re-

[*Original Edition, p. 861.]

maining question is the amount of his damages. The measure of damages, that is, the rule by which you are to estimate them, is the value of the lease at the time of the ouster, July 8, 1872. You are to transport yourselves back to that period of time, and standing there, with no certain knowledge of the future, inquire what was the value, the marketable value, of the lease then held by McKinney. It was a lease of certain coal mines, rights and privileges, having to run until September 1, 1874. You must take the lease with all its provisions and covenants, except that you are to presume that McKinney had the consent of the defendants to sell it. You are to consider only the property embraced in the lease, and not to allow damages for any other personal property owned by McKinney, nor to allow damages by way of punishing the defendants for any outrage or wrongful act committed by them. McKinney was entitled to compensation for the loss of the demised premises, and to an amount equal to their actual marketable value, but no more. I used the word "marketable," in the absence of a better word to express the thought. It means the value or price at which the lease might have been sold, if it had been put in the market and offered for sale. The measure of damages is not the amount of money expended by McKinney in improving the mines, nor the amount of profits he might have made if he had continued to operate the mines for the whole term, but these may be considered in estimating the actual value of the lease. The value of the lease would depend upon the probable profits that might be realized from the mines during the remaining period of the term, from July 8, 1872, to September 1, 1874. McKinney or his purchaser would have to comply with all the covenants of the lease, pay all expenses and rents, keep up repairs, and leave the premises, fixtures, etc., in good condition at the expiration of the lease. These profits are not limited to the amount of coal McKinney was then taking out daily, or had taken out, nor should they be based on the theory that all the coal would be taken out before September 1, 1874. You are to look at the probabilities of the case, and consider these matters only so far as you believe they would influence purchasers, thus throwing light upon the question of value at the time of the ouster. You will take into consideration also the condition and location of the mines, the competition in the business, the means of transportation, the market and probabilities of the future. The price at which McKinney bought out Long's interest, the price at which he agreed to sell to A. G. Negley, the offers he made F. C. Negley and to R. Gray, are all strong evidence of McKinney's estimate of the value. But in these sales and offers you must bear in mind that a good deal of personal property was included not embraced in the lease. So with the offer of \$32,000 made by F. C. Negley. The estimates of the value made by F. C. Negley and A. G. Negley seemed to have been based on the supposition that the mines could be drained by a projected tunnel through the lands of other parties, so that all the coal could be taken out during the remainder of the lease. If so, their estimates are entitled to very little if any consideration. The estimates and opinions of the other witnesses are only to aid you

[*Original Edition, p. 362.]

in determining for yourselves the value at the time of the ouster. And of course the testimony of those witnesses who had the most experience in the business, who knew the most of these mines, had the most knowledge on the subject and the best opportunities of forming a correct judgment, is entitled to the greatest consideration. Taking all these matters into *consideration, you will make up your minds as to what was the value of their lease on the 8th day of July, 1872, and if you find for the plaintiff on the other questions submitted to you, your verdict should be for the plaintiff, for the sum thus ascertained, with interest thereon from July 8, 1872, to the present.

Orphans' Court, Philadelphia.

ESTATE OF MARIA ABERCROMBIE, *Deceased*.

Claims for services as a nurse of a decedent will not be allowed when there is no evidence of a contract, but it appears that the service rendered was a matter of pure charity on the part of the claimant.

Sur exceptions to auditor's report. Opinion delivered *February 5, 1875*, by

HANNA, J.—Exceptions have been filed to the report of the auditor on behalf of certain legatees. As they relate to the same subject, they will be considered together.

A claim was presented before the auditor for nursing and attendance upon the decedent, during the year preceding her death.

The auditor very properly declined to allow the entire amount claimed, but awarded payment for the period of six months prior to the death of the decedent.

The award forms the subject of the exceptions.

In regard to the claim made, the auditor finds "that Mrs. Abercrombie boarded with Mrs. Vieira for several years immediately prior to her death, and died at her house; that she was quite an aged lady; about eighty-four years of age; that she was infirm and always blind. That during the last six months of her life she could not go out without an attendant, and that she needed almost constant care and attention, and part of the time she required nursing at night as well as during the day. To use the language of one of the witnesses, she was almost like a child. The auditor further finds that decedent had no nurse but Mrs. Vieira, and that decedent said to some of the witnesses that Mrs. Vieira was to be remunerated for her kindness and services."

The exceptants alleging by affidavit that the auditor had made a mistake in his finding of the facts, obtained a rule to show cause why all testimony taken before him should not be returned. The rule was made absolute, and the entire testimony is now before us. While it is true the decedent had reached more than four score years, was to some extent infirm, and her sight impaired, yet she was remarkably active; was able to leave her room for meals, except during her last illness, and until six *weeks before her death, was in the habit, accompanied by an attendant, of visiting her friends, and

[* *Original Edition*, pp. 363 and 364.]

dining and supping at their houses. The auditor has, we think, misapprehended the testimony on the part of the legatees. The evidence in regard to the extent, nature and value of the services rendered by the claimant, is meagre and unsatisfactory. The witnesses had no personal knowledge of the decedent, for two or three months before her death.

That claimant, and perhaps members of her family, rendered kind and considerate attentions to this aged lady is undoubted, and in view of all the circumstances, not unnatural. But there is no evidence these kindnesses were extended or received with any expectation of pecuniary compensation therefor. We think it may therefore be safely presumed they naturally flowed from the long acquaintance and mutual friendship of the parties.

Although the decedent stated that Mrs. Vieira should be paid for her services, yet it does not appear when this statement was made, nor that it was communicated to the claimant, nor in consequence thereof, that she at any time rendered any services to the decedent. And in connection with this remark of the decedent, she had at the time, so far as the contrary appears, executed her will, whereby she bequeathed legacies to both claimant and her daughter, no doubt in recognition of their kindness to her.

In *Estate of Margaret W. Wilson*, 8 Philadelphia Reps. 180, it was decided by this court, that a claim for board of a decedent will not be allowed where there is no evidence of a contract, but it appears the service rendered was a matter of pure charity on the part of the claimant. Paxson, J., remarks, "that which was originally a charity cannot be turned into a contract subsequently, merely because there happens to be a small fund from which compensation may be made."

In the case before us, the decedent, a widow, without any relative residing with her, had boarded with the claimant for nine years before her death, furnished her own room and fuel, paid her board at the rate of fifty dollars per month, in advance, was in unusual good health for a person of her extreme age, and did not need the constant care and attention a confirmed invalid would require, until her last illness. In view of these facts it cannot be permitted, after her death, that all the acts of kindness, and considerate attention to her personal comfort, for either a year or six months prior to her death, can be lumped together and made the foundation of a charge for nursing and attendance, at a rate for which she could have procured the unremitting services of a professional nurse. It appears from the testimony, that decedent during her last illness needed the attendance of a nurse, and permitted the claimant to act in that capacity. She was possessed of sufficient means to enable *her to employ a stranger, but she neglected to do so, or probably preferred to be attended by Mrs. Vieira. In that case, the principle laid down in *Smith vs. Miligan*, 7 Wright, 107, would apply, that "where services are rendered by one to another, the law presumes a promise on the part of him who receives them to pay what they are reasonably worth, but this implication is rebutted by any proof that shows an intention to give and receive without compensation." And this

[* *Original Edition*, p. 365.]

implication is also rebutted by an intimate relationship of the claimant and decedent: *Lynn vs. Lynn*, 5 Casey, 369; *Smith vs. Miligan*, *supra*; *Armstrong's Estate*, 26 Legal Intelligencer, 300, and many subsequent cases.

Here there was no relationship between the claimant and decedent, and no obligation upon the former to render any services whatever. In consideration of all the circumstances we think the claimant entitled to compensation for her attendance upon the decedent during her last illness, a period of one month, at the rate fixed by the auditor, and from what was stated upon the argument, we do not doubt if her claim had been originally presented in this form, it would not have been objected to.

For the reasons stated we sustain the exceptions, and recommit the report to the auditor, with instructions to allow and award to Mrs. Vieira the sum of thirty-two dollars, for her services to testatrix, and distribute the balance according to the provisions of the will.

Court of Common Pleas, Schuylkill County.

WILLIAM DeFREHN vs. HENRY LEITENBERGER.

In order to give the defendant the benefit of the provisions of 4th section of act of January 24, 1849, he must have an undoubted life-estate in the land levied upon.

Exceptions to the confirmation of the sheriff's deed. Opinion delivered February 15, 1875, by

WALKER, J.—The exceptions that are filed to the confirmation of the sheriff's deed in this case, are upon the ground that the act of assembly relative to the sale of life-estates has not been complied with.

Previous to the passage of the act of January 24, 1849 (Purdon's Dig. 652, pl. 90), life-estates in lands yielding rents, issues and profits could not be sold under an execution: *Snyder vs. Christ*, 3 Wr. 507. And since that time a strict compliance with the requirements of the act is necessary to pass title to the purchaser. If this be not done, the sale is void, and no life-estate whatever passes: *Kintz vs. Long*, 6 Casey, 501.

The act requires the sheriff, when the defendant has only a life-estate in the land, upon request and notice to the plaintiff by the defendant, at least three days before the holding of the inquisition to make an *appraisement of the yearly value of the land, and return the same with or as part of the inquisition and condemnation, and thereupon, before any writ of *venditioni exponas* shall issue, the plaintiff shall wait thirty days for the defendant to elect to pay the plaintiff the annual valuation in half-yearly payments.

And the act further provides that no writ shall be issued unless by direction of the proper court, and on the application of any lien creditor for a writ of *venditioni exponas* the tenant for life shall have at least ten days' notice of the application for such writ.

This, it is contended, has not been done. But the fact of a life-estate in the defendant (when controverted) cannot be determined

[*Original Edition, p. 306.]

in an application like the present one. The sale is of *all the right, title and interest* of the defendant in the property.

If he has a greater interest than a life-estate the sale would pass a good title to the purchaser. If he has only a life-estate, the sale cannot prejudice him: *Dennison's Appeal*, 1 Barr, 201. In an action of ejectment this can properly be determined.

It is true that the record shows a deed for the property in the defendant's wife recorded previous to the sale, but when a married woman purchases property, the presumption of the law is as against his creditors that it is with the money of her husband, and subject to the claims.

It lies upon the wife to show that it was bought with her funds. Her title may be controverted, and if in such a contest it were shown that the defendant's money purchased it, or that it was conveyed to the wife by her husband, when in debt, to hinder, delay or defraud creditors, or if he intended to go into any hazardous business, the property would be his as against his creditors.

In *Gordon vs. Inghram*, 8 C. 214, it was held that where the creditor has *reasonable ground* to believe that the debtor owns the fee, his interest in the land may be sold on execution, and we therefore think, under the 4th section of the act of January 24, 1849, there must be in the defendant an *undoubted life-estate* to entitle him to the benefit of its provisions.

The purchaser buys the defendant's *right, title and interest* in the land, *other than his life-estate*, and if he takes nothing by the purchase, the defendant cannot complain, and he (the purchaser) must be satisfied, for *caveat emptor* applies.

The acknowledgment of the sheriff's deed is not such a *res adjudicata* as precludes an inquiry into the legality of the proceedings, upon which the sale was made in an action of ejectment: *Braddee vs. Brownfield*, 2 W. & S. 271; *Carb vs. Tozer*, 1 W. & S. 529.

As it has not been satisfactorily established before us that the defendant has *only* a life-estate in the land, we must overrule the exceptions. Exceptions overruled accordingly.

**Eastern District.*

Supreme Court of Pennsylvania.

L. R. HUMMEL *et al.* vs. THE LYCOMING FIRE INSURANCE COMPANY.

Where a policy issued by a mutual insurance company provides, that if an assessment on the premium note be not paid within thirty days after notice and demand, the policy shall be null and void until said assessment be paid. *Held*, that the words "null and void" did not work an extinguishment of the contract, but merely a suspension of the policy until the default was ended, and that the assured was liable for an assessment made on his premium note during such suspension of his policy.

Where a premium note is made payable in such sums and at such times as the directors may, agreeably to their act of incorporation, require, an assessment made by the directors in pursuance of the act is conclusive on the assured, and he will not be relieved from the payment of such assessment, or any part thereof, unless he can show fraud or gross mistake on the part of the directors in making it.

In equity. Appeal from the Common Pleas of Snyder County.
Opinion delivered February 8, 1875.

[*Original Edition, p. 367.]

PER CURIAM.—The prayers of this bill are to set aside the *fi. fa.*, and strike off the judgment at law of the insurance company against the plaintiffs, or to reduce the assessments, Nos. 29 and 30, and prohibit the collection of No. 31. There is a prayer, also, for a statement of the affairs of the company. The master has found against the plaintiffs on all questions affecting the validity of the judgment. He finds the right of the company to assess the premium notes under mutual policies with the losses on policies issued for cash rates; that the charter has been substantially followed in making the assessments; that the act of 1861 is binding on the plaintiffs, who became members long after its passage and acceptance by the company; and he finds that the company had substantially complied with all the requisites of the law in the entry of the judgment. These are, in short, the results of the master's findings, and sustain the defendant in entering the judgment and issuing execution. He erred, we think, in one finding which would affect the sum to be collected, to wit, that the policy was null and void, under the 10th section of the rules appended to the policy, in consequence of the non-payment of the assessment, No. 29, for a period of thirty days. The effect of the 10th section is merely to suspend the benefit of the policy, after thirty days' default in payment, until payment of the assessment is made, either voluntarily or involuntarily, the company by the same section being expressly authorized to retain the premium note to enforce collection. The mistake of the *master is, in treating the words "null and void" as executing an absolute extinguishment of the contract, whereas the provision is only a contract mode of enforcing payment of the premium by withholding the protection of the policy during the default, the contract itself remaining in life, and its operation only being suspended by its own terms until payment is made by the insured, or the assessment collected under the premium note. The moment payment was made, the contract, which was still alive, became again operative in its protection. There was no option to be exercised by the company in order to put an end to the contract, but the contract *proprio vigore* suspended the protection until the default was at an end. Clearly it is the right of the parties to make this condition in their contract, and especially in such a case where by the policy the relation of membership is created.

We think the master erred also in deciding that the assessment was partially invalid because of excessiveness. By the terms of the charter and of the premium note, the assured, as a member of the corporation, submits himself to the acts of the directors, as the common representatives of all the members. He and they are all bound by the assessments made by them, unless he can show fraud or gross mistake. This is a rule he has no right to complain of. He became a member on the very condition of submitting to be thus assessed for losses. The presumption is, that the directors, representing all the members, made the assessment properly. The bill avers neither fraud nor gross mistake. Its only averment is that the assessments were illegal and contrary to the charter. The answer of the company avers the legality and propriety of the assess-

ments, and denies that they were incorrect or excessive. The master, in his findings on this point, does not find fraud or plain mistake, but by a difficult and uncertain process of reasoning, founded on vague and unsatisfactory statistics of the company, and by inferences in themselves uncertain, reaches a conclusion that the assessments were excessive. But, at the same time, the fact clearly appears that by the great conflagration which reduced about one-fourth of the city of Chicago to ashes, the company suffered immense losses, and that, necessarily, the company had to make estimates founded on the knowledge of its risks in that city in order to meet its liabilities, and that this must be done before the liabilities could be fully ascertained. In the presence of such a necessity, and in the absence of all charge and evidence of fraud or collusion among the directors, or gross mistake in the performance of their duty, it would be improper to treat their rightful act in making the assessment on all its members alike as invalid, and as justifying the restraint of their right to due execution for the collection of the money necessary to meet their losses. Had the immense loss by the Chicago fire not occurred, it is not probable we should have heard of this case. *Upon the whole case we discover no good ground to enjoin the execution, or to set aside the judgment. No claim for assessment No. 31 is made, and therefore it is out of the question.

The decree of the court below dismissing the bill is affirmed, with costs to be paid by the appellants, and the appeal dismissed.

Court of Common Pleas, Allegheny County.

THE COMMONWEALTH *ex rel.* vs. JACOB STUCKRATH.

The system for the election of county commissioners provided in the new constitution does not go into operation until the general election in November, 1875.

Where the three years' term of an incumbent county commissioner would expire January, 1875, the election of his successor at the general election in November, 1874, to serve until January, 1876, was authorized and valid under the provisions of the act of April 15, 1834 (P. L. p. 540), and the new constitution.

Under section 2, act June 14, 1836 (P. L. p. 1206), any person duly elected to a township or county office, and qualified, is competent and has the right to file his suggestion, without the intervention of the attorney-general, for a writ of *quo warranto* against the person intruding or unlawfully holding the office.

Election of county commissioners—*quo warranto*. Opinion filed January 29, 1875, by

STERRETT, P. J.—The writ of *quo warranto* in this case was issued upon the suggestion of Jacob Lashel, setting forth in substance:

1st. That at the general election in 1871, the defendant, Jacob Stuckrath, was duly elected a commissioner of the county of Allegheny, to serve for three years next ensuing said election and until his successor was duly elected or appointed, and that the said Stuckrath, on and since the first Monday of January instant, has exercised and still doth exercise the franchises, rights, powers and privileges of a commissioner of said county.

2d. That at the general election in November last the relator was duly elected a commissioner of said county, to succeed said Stuck-

[*Original Edition, p. 369.]

rath, and on the first Monday of January, instant, took and subscribed the oath of office prescribed by the constitution, and gave bond, in due form, which was approved by the court and recorded as required by law.

3d. That notwithstanding the election and qualification of the relator, the said Jacob Stuckrath has on and since the first Monday of January, instant, usurped, intruded into and unlawfully held and exercised the said office of commissioner, and still continues to do so.

The defendant appeared and moved to quash the writ. After argument the motion to quash was denied; and thereupon he demurred to the suggestion, and assigned the following causes of demurrer, viz.:

*1st. That the suggestion is insufficient in law and does not contain any matter whereon the court can ground any order or judgment, or give the relator any relief, etc.

2d. That the relator is not a proper or competent party to prosecute the writ of *quo warranto* in this case.

3d. That the suggestion is insufficient in form and substance.

4th. That the pretended election of the relator as a commissioner of said county was, and is illegal, null and void.

5th. That by the constitution and laws of the commonwealth the respondent was and is entitled to hold and enjoy the office of commissioner, with all the rights, powers, etc., thereunto appertaining, until the first Monday of January, A. D. 1876.

On the argument it was claimed by the learned counsel for the defendant, that under the provisions of the new constitution he is entitled to hold the office of commissioner until the first Monday of January, 1876; that the election of the relator in November last was unauthorized and void and that in any event the relator has no standing in court for the reason that the writ could not issue without the intervention of the attorney-general.

These positions cover the whole case and present for our consideration two questions, viz.: Whether the election of the relator in November last was authorized by law, and if so, was it competent for him to make the suggestion upon which the writ issued?

If the position assumed by the defendant, viz.: that his term of office is not ended, and will not expire until the first Monday of January, 1876, be correct, it follows as matter of course, that the election of the relator was without authority of law and therefore void. Let us inquire how this is.

Before the adoption of the present constitution, commissioners were elected under the act of 1834, which provided for the election of one commissioner at each annual election, to serve for three years and until his successor was duly elected and qualified. This act continues in full force, except so far as it has been abrogated by the provisions of the new constitution, which went into effect on the first day of January, 1874, "for all purposes not otherwise provided therein." The 2d section of the schedule provides that all laws in force at the time of the adoption of the constitution, not inconsistent with it, shall continue.

[*Original Edition, p. 370.]

Section 7 of article 13 provides that at the general election in 1875, three county commissioners shall be elected on the system of limited voting, and, in like manner, three every third year thereafter. When this new system goes into operation at the general election in November, 1875, it will necessarily supersede the provisions of the act of 1834, requiring the election of one commissioner annually. Then, instead of one, three commissioners will be elected, and each voter will be entitled to vote for not more than two of them. But, until the new system does take effect, the act of 1834 may well stand, except as to such provisions of it as are changed by the new constitution.

In order to prepare the way for the introduction of this new system, the 28th section of the schedule provides that "the terms of office of county commissioners, chosen prior to the year 1875, which shall not have expired before the first Monday of January, 1876, shall expire on that day." This will apply to the commissioners elected in the years 1873 and 1874.

Under the act of 1834, a commissioner elected at the general election in October entered upon the duties of his office as soon as he gave bond and was duly qualified. The second section of article 14 of the constitution provides that commissioners, as well as other county officers, shall enter upon the duties of their office on the first Monday of January next after the election. To meet this and other changes introduced by the new constitution, as to the time of holding elections, etc., the 26th section of the schedule provides that "all persons in office at the time of its adoption and at the first election under it, shall hold their respective offices until the term for which they have been elected or appointed shall expire, and until their successors shall be duly qualified, unless otherwise provided in the constitution."

By virtue of this last provision the defendant was undoubtedly entitled to hold his office until the first Monday of January, instant, and if his successor had not then been duly elected and qualified, he would be entitled to continue in office. But why should he claim to hold the office for more than a year longer than the term for which he was elected?

We have referred to all the provisions of the new constitution, bearing on the office of county commissioner, and found nothing that conflicts with the right of the people to elect a commissioner, at the last general election to succeed the defendant, and serve until the first Monday of January, 1876, the time fixed for the induction into office of the new board of commissioners, to be chosen at the next November election. On the contrary the election of the relator appears to be in perfect harmony with the new system which will then go into effect. The change in the mode of electing commissioners, that is of electing three at once and three every third year thereafter, instead of one annually by the terms of the constitution itself, does not go into operation until the next annual election; and if this be so, why should not the act of 1834 be regarded as still in force at the time of the last general election, and the election of the relator be considered regular and valid? It is true

[*Original Edition, p. 371.]

that *he cannot serve longer than until the first Monday of January, 1876, because the new constitution provided, as we have seen, that the terms of all commissioners elected prior to the year 1875 shall expire on that day.

This construction appears to be in harmony with all the provisions of the new constitution, and at the same time gives force and effect to the act of 1834, until the new system goes into operation.

We conclude therefore that the election of the relator in November last was authorized by law and valid, and that on the fourth day of January, instant, he had the right to assume the duties of the office of commissioner as the regularly elected and qualified successor of the defendant.

Assuming this to be so, the next question is, whether it was competent for him alone, without the intervention of the attorney-general, to present the suggestion upon which the writ issued?

We are of opinion that it was. The second section of the act of June 14, 1836 (Purdon, 1206), giving the Courts of Common Pleas concurrent jurisdiction with the Supreme Court in certain classes of cases therein specified, provides that writs of *quo warranto* may be issued in said courts, "in case any person shall usurp, intrude into or unlawfully hold or exercise any county or township office," etc., etc., and then concludes with these words, viz.: "and in any such case the writ aforesaid may be issued upon the suggestion of the attorney-general, or any person or persons designing to prosecute the same." This has reference to the cases enumerated in the second section of the act, as was held in *Com. vs. Burrell*, 7 Bar. 34. While the words "any person or persons designing to prosecute the same" would appear to authorize any one to appear as relator in such proceedings, it has been held under the practice, founded on the statute of 9th Anne, that they mean any person having an interest to be affected or suffering a wrong to be redressed, and not a mere stranger who has no interest.

A relator who is entitled to a township or county office, into which another has intruded or which is wrongfully held by another, has a special interest in the question which he seeks to raise by a writ of *quo warranto*. In *Commonwealth ex rel. McLaughlin vs. Cluley*, 6 P. F. Smith, 270, this question was before the Supreme Court, and it was there held that the relator, McLaughlin, had no standing in court, for the sole reason that he had no right to the office of sheriff from which he sought to oust Cluley.

The question was also considered in *Com. vs. Burrell* above cited, and the reasoning of the case justified the conclusion that a person who has been duly elected to a township or a county office, and has qualified, has a right under the second section of the act of June 14, 1836, to file the *suggestion for a writ of *quo warranto* against the person who has intruded into or unlawfully retains the office.

From what has been said it follows that judgment on the demurrer should be entered in favor of the commonwealth.

January 29, 1875, this cause came on to be heard on the demurrer and was argued by counsel, and upon consideration thereof it is

[*Original Edition, pp. 372 and 373.]

adjudged and determined that the relator, Jacob Lashel, was duly elected to the office of commissioner of the county of Allegheny, and on the fourth day of January, instant, was duly qualified and rightfully entitled to exercise the franchises, right, powers and privileges of said office, as the successor of the defendant, Jacob Stuckrath; that on and since the last mentioned day, the said defendant has usurped, intruded into, and unlawfully held, and exercised said office; and it is now considered and adjudged that the said defendant, Jacob Stuckrath, be ousted and altogether excluded from the said office of commissioner, and that he pay the costs of this proceeding.

Orphans' Court, Philadelphia.

ESTATE OF JOHN GRIGG, *Deceased*.

1. The principal sum of \$120,000 is not too large an amount to be withheld from distribution upon the audit of an administrator's account for the purpose of meeting an annual payment of \$6,000.
2. The jurisdiction of the Orphans' Court over claims made against a solvent estate, by creditors of the decedent, is not exclusive, but concurrent with that of the courts of the common law; and where a creditor has elected to sue in another tribunal, and refuses to present his claim against the fund for distribution in the Orphans' Court, the latter will, notwithstanding a legatee's demand for present distribution, direct enough of the fund to be retained by the administrator to meet the exigency of the creditor's suit in another court.

Exceptions to auditor's reports. Opinion delivered *February 6, 1875*, by

DWIGHT, J.—Pursuant to a decree of this court confirming a former report of the auditor, the administratrix has retained a fund of \$120,000 to meet the annual interest of a bond given by the decedent to a daughter, by which he bound himself, his heirs, etc., to pay to her or her order during her life, \$6,000, in monthly payments of \$500.

The accumulations of this fund now amount to \$20,931.85. In view of this fact, the exceptant asks that the principal be reduced to \$105,000.

We do not think it necessary to determine whether the confirmation of the report of March 3, 1865, is *res adjudicata*. We are agreed that the margin then allowed is not excessive, in view of the continual urgency of the demand of the bond on the estate.

*The present reports are upon the fourth and fifth accounts of the administratrix. They show a balance, including the accumulations noted, of \$79,457.21.

With respect to this balance, the auditor reports that it should be retained by the accountant to meet possible recovery on another bond given by the decedent to the obligee for \$50,000, the interest on which has been running for eight years. The obligee instituted suit in the Circuit Court of the United States to October sessions, 1873, No. 60, and did not appear as a creditor claiming before the auditor. The exceptant therefore asks that this balance be distributed.

In *Sergeant's Executors vs. Ewing*, 6 Casey, 75, it is said: "It is not

[* *Original Edition*, p. 374.]

doubted but, that, if the plaintiff had submitted his claim to the adjudication of the auditor, and it had been passed on by him, and his report confirmed by the Orphans' Court, it would have been conclusive on him: *Kittera's Appeal*, 5 Harris, 422; and he would have been estopped from contesting in the future what has been passed upon under this proceeding. But he had a full right to move as far as he did, for either of two purposes, or both, namely, to ascertain, by compelling a settlement of the executor's accounts, the precise amount of the personal estate, so as to govern his action in regard to proceeding to bind the realty; or, for the purpose of having his claim finally ascertained and adjusted by this tribunal, so as to claim a share in the distribution consequent on the settlement. Either purpose was legitimate, and there surely is no rule of law that will hold him bound by an adjudication to which he was a stranger in fact, and wherein the subject matter of his claim was never passed upon. There must either be evidence showing adjudication or law that the party was bound to submit his claim to the tribunal, in default of which he would be as fully bound as if he had submitted.

It is true that this was said in reference to a plea in the court below, that the exclusive jurisdiction of the Orphans' Court was a bar to the suit. But in *Swain vs. Etting*, 8 Casey, 486, which, in the court below, was a suit on certain promissory notes against the executors of a decedent, by one who had appeared by attorney before the auditor of their accounts filed in the Orphans' Court, it is said; "Since the trial of the cause and the preparation of the argument of the plaintiffs in error, the case of *Sergeant's Executors vs. Ewing*, reported in 6 Casey, 75, has been decided, which disposes of both objections, upon the simple ground that the jurisdiction of the Orphans' Court is concurrent and not exclusive; and that the creditor has a right to select the forum in which his case shall be tried. In this case it is clear that the plaintiff elected to pursue her remedy in a common law court, a right which was secured to her by statutory enactment.

That the jurisdiction of the Orphans' Court is concurrent and not *exclusive, is also decided in *Dyer's Appeal*, 3 Gr. 326, and in *McLean's Executors vs. Wade*, 3 P. F. S. 149.

In *Dundas' Appeal*, 23 P. F. S. 479, it is said: "The decision of the Orphans' Court in this case was against its own jurisdiction, and in this there was error." It was said by Black, C. J., in *Whiteside vs. Whiteside*, 8 Harris, 473, "if there be anything besides death which is not to be doubted, it is, that the Orphans' Court alone has authority to ascertain the amount of decedent's property, and order its distribution among those entitled to it. The exclusiveness of this jurisdiction is sustained by numerous modern decisions, to a few of which I may refer: *Shollenberger's Appeal*, 9 Harris, 341; *Ashford vs. Ewing*, 1 Casey, 213; *Black's Executor vs. Black's Executor*, 10 Casey, 354; *Musselman's Appeal*, 15 P. F. Smith, 480."

In the case last cited, a question suggested whether a purchaser of real estate from the executor of a testator, who had directed his land to be sold, without naming any one to execute the power,

[*Original Edition, p. 375.]

could be made amenable to the jurisdiction of the Orphans' Court, was decided in favor of that jurisdiction; and it was supported by analogies, one of which is, that "the Orphans' Court may also bring in creditors, in cases of distribution of assets; *Kittera's Estate*, 5 Harris, 416; *Bull's Appeal*, 12 Harris, 286. . . . Provision is fully made for the exercise of its jurisdiction by the Orphans' Court, in the 57th section of the act of the 29th of March, 1832, to wit, 'by awarding a citation on the petition of any one interested.'"

Since the Orphans' Court may also bring in creditors in cases of distribution of assets, it would seem to be law that the party is bound to submit his claim to that tribunal, in default of which he would be as fully bound as if he had submitted, unless the statement cited from *Muselman's Appeal* is applicable only to cases of distributions of assets not sufficient to pay all the debts of a decedent. For a power to bring in implies that a duty to come in has been neglected. This duty is clear in the case of an estate whose assets are less than its debts, and the neglect of it is followed by a forfeiture of the right to be paid out of the fund. So is it in the case of an estate, the personalty of which cannot satisfy all the debts, but the realty of which is able to supply the deficiency. This was the condition of affairs in *Sergeant's Executors vs. Ewing, supra*, and it was there said that the creditor neglecting or refusing to make his claim for debts due him, is not "entitled to receive any dividends of such remaining assets, that is, of the assets for distribution according to the provisions of the act. He cannot claim a share of them. But he is not barred from recovering a judgment, and looking to the real estate of the testator or intestate for satisfaction." To these instances it is probable that the Supreme Court refer in deciding that the jurisdiction *of the Orphans' Court over the fund is exclusive, for the reason that the creditor cannot share in it except by coming into the court and proving his claim. But does this hold true, when the personal estate can pay all the debts without resorting to the realty, which is the status of Mr. Grigg's estate? For us to hold that our jurisdiction is exclusive in this case also, is to decide that the common law courts have no jurisdiction, a question which they have a right to decide for themselves. Such a course on our part would involve a grave invasion of their prerogative, and would subject executors and administrators to the vicissitudes which a conflict of jurisdictions would develop. It is alike therefore demanded by decorum and the interests of estates that we should keep well within our jurisdiction, and not, by asserting, possibly exceed it.

The decedent's estate would now be indebted to the obligee in the sum of \$74,000, if the suit which he has brought should result in his favor. The margin between this sum and the balance on hand is not too large, in our judgment, to ensure due protection to the administratrix.

We therefore decide to dismiss the exceptions and to confirm the auditor's report.

[* *Original Edition*, p. 376.]

Court of Common Pleas, Schuylkill County.

CHARLES HEWETT vs. WM. H. BRIGHT.

An affidavit of defence set forth that the notes in suit were given for lumber which defendant was to sell for payee on commission, and that there was an agreement made at same time that if the lumber was not sold when notes matured, then the payee was to take care of them and have them renewed, and that the endorsee who was the plaintiff knew of this agreement and had taken the notes as a collateral security for a pre-existing indebtedness.

Held, That if the notes were to be regarded as accommodation notes, then the endorsee could recover even though they were pledged as a collateral security for a pre-existing indebtedness, and he knew of the agreement between the parties.

That if the notes were to be regarded not as accommodation notes, but as given in the usual course of business, then the parol agreement merely affected the time of payment of the note, and not the consideration, and for that reason was inadmissible in evidence.

That the affidavit was defective in not showing due and reasonable diligence on the part of the defendant in selling the lumber.

Rule in above cases for judgment for want of sufficient affidavit of defence.

Opinion delivered by

GREEN, J.—These are suits upon two promissory notes, one dated January 20, 1874, at 4 months for \$1,000, the other February 16, 1874, at 6 months for \$800, given by the defendant to J. H. Jenkins, President of the N. C. Manufacturing Company, and transferred by endorsement to the plaintiff. The defendant sets out in his affidavit of defence that he had received a large amount of lumber from the payee to be sold on commission, and that he gave these notes on account of this lumber, but with the understanding that the notes were to be renewed when due, or that payee was to take care of them, unless the defendant was able to pay them from money in his hands arising out of the sale of the lumber. He also swears that when the notes fell due, he had no money in his hands, arising from such sale to pay them, and that they are without consideration. And further that the notes were transferred to the plaintiff, as a collateral security for a pre-existing debt, due from payee, and with full knowledge of the arrangement between the maker and payee as to the payment of the notes, and that the transfer of said notes to plaintiff was a fraud on the defendant.

Is this defence sufficient? For a proper analysis of this question there are two points of view in which these notes may be regarded. First, as accommodation notes, and second, as notes given for a supposed consideration or for a consideration which has failed.

If we regard these notes as accommodation notes, then clearly they were loans of the maker's credit for the benefit of the payee. Even if there was an express agreement between them that the payee was to take care of the notes when they became due, this would not affect the endorsee, even if he had knowledge of the agreement. Such an agreement would be no more than is implied in the giving of any accommodation note, viz.: That the party who is accommodated, that is, the real debtor, should pay the note when due. This is just what this affidavit of defence in effect alleges,

[* *Original Edition*, p. 377.]

that the payee would take care of the note and that it was to be renewed when due if the maker had not sufficient money in hand arising out of the proceeds of the lumber to pay it himself.

Another consequence follows if these notes are to be regarded as accommodation notes. They might be used either for the purpose of obtaining money by selling them, or to pay a pre-existing debt, or as a collateral security for such indebtedness. And the fact that the holder knew they were but accommodation notes would constitute no defence, for *non constat* that they were not given for the very purpose to which they were applied, whether to pay a pre-existing debt or as a collateral security for the said debt, as is alleged in the present case. The rule of law upon the subject is very forcibly put by C. J. Black in *Lord vs. The Ocean Bank*, 8 H. 386: "He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequences, and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way. Accommodation paper is a loan of the maker's credit, *without restriction as to the manner of its use." See also *Appleton vs. Donaldson*, 3 Barr, 381; *Moore vs. Baird*, 6 Casey, 138.

If we regard these notes not as accommodation notes, but as given in the usual course of business, then, if they have been endorsed over to the plaintiff not as an absolute payment, but only as a collateral security for a pre-existing debt, it is evident that the defendant may avail himself in this suit of any defence which he may have against the payee of the note. Whether such defence would avail him if the note had been transferred as an absolute payment it is needless to inquire. The affidavit of defence avers that it was transferred as a collateral security. In the case of *Selden vs. Neemes*, 7 Wright, 421, which was a suit brought on a promissory note by an endorsee against the maker, Woodward, J., says: "It is of no consequence that the suit is in the name of Neemes (endorsee), for the affidavit alleges that he holds it merely as collateral for an old debt of Simkins (payee), which is to allege that Simkins is the beneficial party in the suit. If Neemes so holds the note, he is suing it for the benefit of Simkins, and the defence is as appropriate as if Simkins, and not Neemes, were the plaintiff named on the record."

Would, then, the defendant have a defence if the payee was the plaintiff? Does the affidavit disclose such a state of facts as to show that these notes are without consideration as is alleged? They were given on account of lumber, which was in the defendant's possession and which he alleges he had received from the payee to sell on commission. True, the defendant alleges that they were not to be paid until he had money enough out of the sale of the lumber to pay them, and that in the meantime the payee was to take care of them and have them renewed. But this is an allegation which affects merely the time of payment, and not the consideration for which they were given. The defendant says in effect, I'm bound to pay, but I'm not bound to pay now—not until I have sold the lumber which is in my possession. This strikes not at the considera-

[*Original Edition, p. 378.]

tion, only at the time of payment. The defendant having the payee's lumber in his possession, which he was to sell and with the proceeds of which he was to pay the notes, cannot set up either a want of consideration or for the same reason a failure of consideration. Even if he could, it does not appear that the fault was not his that the lumber was not sold and the money realized. For aught that appears, if he had been reasonably diligent, he might have sold the lumber. If he were to allow the lumber to rot in his yard, could he thus indefinitely postpone and eventually defeat the payment of these notes, without alleging some sufficient reason why it was not sold? Most assuredly not. Nor does the affidavit allege any restriction or interference on the part of the payee which prevented the sale of the lumber.

*The notes having been given for a consideration, the only question that remains is whether a parol agreement, made when the notes were given, which only affected the time of payment can avail as a defence. Clearly it cannot, because it is inadmissible in evidence to vary or contradict the written contract of the parties. It could not be given in evidence as between the maker and payee, much less between the maker and endorsee. The case of *Anspach vs. Bast*, 2 P. F. Smith, presents some striking features of similarity to the present case. The suit was brought upon a note at six months, part consideration of the purchase of a colliery. The defendant in his affidavit made defence upon the ground that there was a parol agreement at the time the note was given, that it was to be paid out of the coal mined at the colliery at the rate of thirty cents a ton, and that if enough coal had not been got out to pay it at maturity, then it was to be renewed. The affidavit was held insufficient upon two grounds. First, because it did not aver that the mines had been "diligently and constantly worked," which the agreement required them to be, and second, because parol evidence of an agreement made when note was given, that it should be renewed at maturity, would contradict the written contract of the parties and was therefore inadmissible.

In *Hirst vs. Hart*, 23 P. F. Smith, p. 289, Sharswood, J., says: "Nor was the fact that Heoner (payee) had agreed not to negotiate the note and to renew it until it could be paid out of the profits any more available, even as between the parties. Such a parol agreement, though made at the time, is inadmissible in evidence to vary the effect of the written contract in the case of negotiable paper." To the same effect are *Hill vs. Garr*, 4 Barr, 493, and *Mason vs. Graff*, 11 Casey, 448.

For the reasons stated the rules for judgment for want of sufficient affidavits of defence are made absolute.

Rules absolute.

[*Original Edition, p. 379.]

Court of Common Pleas, Schuylkill County.

BOROUGH OF POTTSVILLE vs. SAFE DEPOSIT BANK, Administrator of Charles W. Pitman, deceased, owner or reputed owner, etc.

A municipal claim for curbing or paving, filed against the administrator of a decedent, owner or reputed owner, or whoever may be the owner, and describing the lot or lots against which the lien is claimed, is a sufficient designation of the ownership of the premises.

The non-apportionment of such a claim is not ground for striking it from the docket.

Rule to show cause why the above municipal lien and all *proceedings under it should not be stricken off for matter appearing on the record. Opinion delivered *February 23, 1875*, by

PERSHING, P. J.—The municipal lien in this case was filed under the authority vested in the town council of the borough of Pottsville, by an act of assembly passed the 11th day of April, 1859, which provides "that in all cases where the owner, tenant or occupier of lots in the said borough, in front of which the side-walks are not paved or curbed, shall neglect or refuse to pave and curb the same within sixty days after notice given to such owner, tenant or occupier, the town council may have said sidewalks paved and curbed, and the expense thereof shall be a lien upon the lot in front of which the same may be done, until paid, and the amount thereof, with legal interest, may be collected as mechanics' liens are collected under existing laws." By a supplement to this legislation passed March 6, 1860, the borough may recover in addition to the cost of the work twenty per cent. in the manner prescribed in the act of 1859.

Two reasons were assigned on the argument in support of the rule: first, that the lien is filed against the administrator of C. W. Pitman, deceased; and second, that it is not properly apportioned on the property.

In the filing of mechanics' liens, the apportionment of a claim between two or more buildings, is provided for by statute. If the lien be filed against one of the buildings for an improper proportion, it can be adjusted by a jury on a trial on the *scire facias* under the direction of the court: 1 Har. 170. Under the mechanics' lien law where a claim is filed against two or more buildings owned by the same person, a failure to apportion it, has the effect of postponing it "to the other lien creditors:" see sec. 13, act of 1836. "I can find no case where a mechanics' lien was stricken off because not apportioned; and as the statute under which this municipal lien was entered is silent as to apportionment of a claim for paving and curbing, the not doing what the law does not require, can furnish no ground for our striking off the claim as filed.

Nor do we think we are required to strike off this lien because it is entered against the administrator of C. W. Pitman, deceased. It is the land that is proceeded against, and it is no defence that the defendant is not the owner: *County vs. Price*, District Court, 1847; 6 Casey, 63.

The proceeding is, in fact, against the lot or *in rem*, 1 H. 247. In
[* *Original Edition*, p. 380.]

Northern Liberties vs. Coates' Heirs, 3 Harris, 245, it is decided that "a municipal claim for laying iron pipe, filed against heirs of John Coates, deceased, owner or reputed owner, or whoever may be owner, and describing the real estate against which it is claimed as a lien, is a sufficient designation of the ownership of the premises." The court below *ordered the writ of *scire facias* to be quashed, and the lien of the claim to be stricken from the record, for the reason that "the term heirs of John Coates, deceased, designates nobody." This action was reversed by the Supreme Court, as will be seen by reference to the case. Mr. Justice Coulter says: "The act of assembly of 22d April, 1846, section 23, would seem sufficiently to cover the proceeding." This section may be found in *Purd. Dig.* page 1371, pl. 99. It provides that "where any person shall hereafter die, leaving real or personal estate, which, by the existing laws of this commonwealth, is subject to taxation for State or county purposes, such property, so long as the same shall belong to the estate of such deceased person, may be taxed in the name of the decedent, or in the name of his administrator or administrators, executor or executors, or his heirs generally, or in the name of any of the administrators, executors or heirs; and in taxing it in the names of the executors, administrators or heirs, it shall not be necessary to designate them by their Christian or surnames," etc.

If this section will cover the proceeding where the ownership is laid in the "heirs" of a decedent, it requires no argument to show that it will equally apply where the ownership is laid in the administrator of a deceased owner.

In view of other applications of this kind, we may say that the striking from the docket of this claim would not extinguish the lien against the property. That is given by the statute, and continues until the expense incurred in curbing or paving is paid. It is necessary to file the claim as the first step toward the enforcement of the remedy for collection. If the first one is defective, another and another may be filed, and no prior one can be pleaded against the last.

The municipal lien in this case, deriving its vitality from the act of 1859, is independent of any claim filed, which is but the mode of giving it fruitful effect, and is not affected, like mechanics' liens, by the running of time. Payment, and that alone, will extinguish it, and release the property bound from its grasp: See *Bournonville vs. Goodall*, 10 Barr. 133.

And now, February 23, 1875, rule discharged.

Orphans' Court, Philadelphia.

ESTATE OF MRS. MARIA STILLE, Deceased.

The accumulations directed by this will held to be void, and directed to be given to the minor, as decided in *Pennsylvania Co.'s Appeal*, 31 Legal Intelligencer, 69.

Exceptions to auditor's report. Opinion delivered February 20, 1875, by

DWIGHT, J.—Testatrix directed her executors to divide a fifth part
[*Original Edition, p. 381.]

of her residuary estate into moieties, and to hold each on the following *trusts: To collect the interest and income thereof, and accumulate the same until a granddaughter reached full age or married, and then to hold said portion with the accumulation, as a fund in trust, to receive and pay the interest and income thereof, for the said granddaughter's sole and separate use during her natural life, and after her death, for the use of any child or children whom she might leave, and in case of death without issue, then over to the survivor, and in case both died, then over to such of testatrix's own children as might then be living, etc.

The points of decision are these three: First. Is the direction of this will to accumulate, void? Second. Do the accumulations, if void, go to the granddaughter? Third. If not to the granddaughter, to whom?

"The auditor submits that said direction to accumulate is thoroughly transgressive of the 9th section of the act of April 18, 1858, § 9, Purd. 1245, pl. 9, and is void, because the right to the accumulations is not given to the said minors."

This is the act: "No person or persons shall, after the passing of this act, by any deed, will or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interests or profits thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler or testator; that is to say, only after such decease during the minority or respective minorities, with allowance for the period of gestation of any person or persons, who, under the uses or trusts of the deed, will or other assurance, directing such accumulation would, for the time being, if of full age, be entitled unto the rents, issues, interests and profits so directed to accumulate; and in every case, where any accumulation shall be directed otherwise than aforesaid, such direction shall be null and void in so far as it shall exceed the limits of this act, and the rents, issues, interests and profits so directed to be accumulated contrary to the provisions of this act, shall go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

Under this act, a testator may settle any real or personal property in such manner that: First, the rents, issues, interests or profits shall be wholly or partially accumulated during, Second, the minority of any person who, Third, under the trusts of his will would, for the time being, if of full age, be entitled unto the rents, issues, interests and profits so directed to accumulate.

The chief and essential test for ascertaining if accumulations are lawful, is, would the minor, if of full age during the time the accumulations are accruing, be entitled unto them? That is to say, are the *accumulations the minor's property, minority being the sole obstacle to his present enjoyment of them? If so, it follows that he would take them as his property on arriving at majority. They must be his property by the will, that instrument fixing his title, and deferring his coming to his own. This leads us to look at

[*Original Edition, pp. 382 and 383.]

the will, to see if Mrs. Stille's granddaughter was entitled by it to take these accumulations on arriving at majority, or upon entering into marriage.

The will does its utmost to prevent this. It expressly provides that the granddaughter shall never have the accumulations. They are not to be paid to her *en masse* at that time, nor at any time. Still less are they portions extracted from a provision for maintenance during minority to be handed over upon the happening of either of the events mentioned in the will. On the contrary, this lady is the only person mentioned in the will, who, by the will, is not to have the accumulations. Under the application of the chief and essential test, therefore, they are not lawful.

It has been argued before us that, if it is admitted that the accumulations are void, they must, nevertheless, be awarded to the minor by force of the proviso of the act, which is in these words: "Provided, that notwithstanding any directions to accumulate rents, issues, interests and profits for the benefit of any minor or minors, it shall be lawful for the proper court, as aforesaid, on the application of the guardian, where there shall be no other means for maintenance or education, to decree an adequate allowance for such purpose, but in such manner as to make an equal distribution among those having equal rights or expectancies, whether at the time being minors or of lawful age, because if the accumulations do not go to the minor, there is no fund out of which an adequate allowance can be decreed. It might be said that if it were admitted that the void accumulations do not go to the minor, the act might receive a consistent interpretation. The legislature, by the act, has undertaken to distribute part of decedent's estate, because unlawfully accumulated, and to say to whom it shall go. It can certainly qualify the grant which it has the power to make and can say that if a minor is in distress, the court may take part of the void accumulations for the minor, and the parties contemplated by the act to take the rest. In other words, it can turn a rill from the stream of its bounty toward a child in need.

But we think the true interpretation of the proviso is to qualify the will's direction to accumulate, not the legislature's direction to scatter abroad. The will may lawfully direct accumulations of the entire income, or the larger part thereof, during some minorities, and not provide a sufficient maintenance for the infant; but it may do this, provided, notwithstanding, such directions to accumulate for the benefit of the minor, that it shall be lawful for the proper court to divert the accumulations to *present necessities, when they are the last resource. "Where there shall be no other means for maintenance or education" is the expression of the proviso. No other means than what? The unlawful accumulations or the lawful? Clearly the meaning is that the lawful accumulations, which must be the property of the minor in order to be lawful, shall not continue to accrue during minority, unless the infant has other means of support; but if the infant has no property sufficient to maintain him, except his property in the form of the accumulations, the court may order an allowance out of the latter.

[*Original Edition, p. 384.]

Now the accumulations are unlawful only because they are not made the minor's property by the will. As the learned auditor has observed: "The directions of this will to accumulate are void, because the right to the 'accumulations' is not given to the said minor." How, then, are accumulations not given to a minor in any sense his property? What is the power which transmutes the property of a decedent not given to a minor by the "accumulating" clause into the minor's property and makes it a part of his means from which the court may decree an allowance? If there is any other clause of the will which makes this change the power can be found in it. But in this will the direction to accumulate is in the residuary clause. The will is silent.

We must, therefore, look elsewhere. The act of 1853 says that the unlawful accumulations shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been divested.

It will be seen that the act itself does not determine specifically the individual recipients. It merely designates them as "those who would have been entitled" to the accruing products, in case the will had been silent respecting their destination. The title must be found, as already mentioned, either in some other clause of the will or in some statute or rule of law. This will may be searched in vain for such title. We are remitted to a statute or rule of law.

By the statutes the undisposed part of a decedent's personal estate usually goes to his next of kin. The rule in England is thus stated in *Smith on Executory Interests*, § 741, III.: "Where the income of residuary property is to be accumulated prior to the vesting infeasibly of such residuary property; the income accruing . . . upon or from such residuary property, goes to the heir-at-law in the case of real estate, or to the next of kin in the case of personal estate."

To this rule there is an exception in this State. *The Penna. Co.'s Appeal*, 31 Legal Intell. 60, decided that if a will directed unlawful accumulations to be made during the minority of an infant to be capitalized and the interest of the capitalized accumulations to be paid to *the person, formerly an infant, during life, from and after the attainment of majority, the unlawful accumulations are the property of the minor.

In conformity with this decision we decide that accumulations made contrary to the statute by the trustees under Mrs. Stille's will are the property of the granddaughters. We will make a decree drafted pursuant to this decision by counsel.

Supreme Court of Pennsylvania.

LOSEE vs. BISSELL.

An irregular endorsement of a note should put a purchaser on inquiry, and affects him with notice of the equities of the parties.

Error to the Common Pleas of Crawford County. Opinion delivered January 4, 1875, by

SHARSWOOD, J.—It appears by the evidence that the defendant
[**Original Edition*, p. 385.]

below had endorsed his name on the back of a note drawn to the order of McFarland at his, McFarland's, request, and upon the assurance that it was a mere matter of form and he would not negotiate it. The defendant's endorsement was in law upon the condition that McFarland should assume the position of first endorser: *Shafer vs. Farmers' and Mechanics' Bank*, 9 P. F. S. 144. At the time it was first presented to the plaintiffs for discount it may have been in that position, and if it was it bore on its face distinct, unequivocal evidence that it had not been negotiated in the ordinary course of business. To make such negotiation it should have appeared that McFarland had endorsed to Losee, and Losee back again to McFarland, in whose hands the note was when it was offered for discount. But the most important link in the chain was wanting—the first endorsement by McFarland. For him to negotiate the note without such endorsement was to attempt a fraud on Losee and was of itself sufficient to put the plaintiff upon inquiry. Such inquiry would have developed the fact that there was no consideration as between McFarland and Losee, and that McFarland was negotiating the note contrary to his express agreement. The learned judge below thought that if the endorsement by McFarland was made after discount and before maturity, it established the *bona fides* of the endorser, but not after maturity. Why not? Bissell & Co. had notice of the irregular character of the paper when they took it, and if that can be helped by putting it afterwards into regular shape, it might be done as well after maturity as before. Endorsements may be filled up in full or stricken out on the trial so as to conform to the declaration. If there had been no defence as between McFarland and Losee the endorsement in question might *have been made on the trial. But to determine the character of the endorser as a *bona fide* holder for value without notice, the point of time at which he parts with his money is the important fact. If the paper was then on its face irregular—out of the usual course of business—the effect of that knowledge on the endorser could not be prevented by subsequently putting it in a regular shape. We think, therefore, that the second assignment of error must be sustained.

Judgment reversed and a *venire facias de novo* awarded.

Court of Common Pleas, Schenck County.

RUTH LEIB *et al.*, Administrators, DANIEL H. LEIB, Deceased, vs. JAMES LANIGAN.

It is no defence to a suit on an accommodation note, brought by the endorsee against the maker, that the endorsee purchased it for a less sum than its face called for.

Rule to show cause why judgment should not be entered for want of a sufficient affidavit of defence. Opinion delivered March 8, 1875, by

PERSHING, P. J.—The affidavit of defence in this case alleges that the note in suit is one of several renewals of an accommodation note made by the maker (the defendant) for the benefit of the

payee, by whom it was endorsed to the plaintiff, and that the plaintiff, with the knowledge that the maker received no consideration from the payee, discounted the original note and the renewals at a usurious rate of interest. Defendant avers that on this ground he is entitled to a credit on the note in suit of five hundred dollars and upwards.

In support of this as constituting a defence the case of *Gaul vs. Willis*, 2 Casey, 259, has been cited. There the holder, who was the second endorser, was allowed to recover from the maker of an accommodation note the entire amount according to its tenor, though the discount at each negotiation exceeded six per cent. It is said, however, by the court, that the plaintiff had no notice whatever of the purpose for which the note was made. Want of knowledge in that case is made to distinguish it from this one, where knowledge on the part of the plaintiff that as between the maker and the payee the note was a mere accommodation, is distinctly alleged. Suppose the allegation to be proved, we do not think it would stand in the way of a recovery by the plaintiff. The *bona fide* sale of a note, bond or other security at a greater discount than would amount to legal interest is not, *per se*, a loan, although the note may be endorsed by the seller, and he remains responsible: 9 Peters, 103; 6 Ohio St. R. 19. An action by an endorsee against the maker cannot be defeated by showing that no consideration passed to the maker from *the payee and endorser. It is sometimes said that such defence is good against the endorsee, when he took the paper with notice of the want of consideration, or of any circumstances which would have avoided the note in the hands of the endorser. But the case of an accommodation note, whether made or endorsed for the benefit of the party to whom the maker or endorser intends to lend his credit, is an exception to this rule. If A makes a note to B or his order, intending to lend B his credit, and gives it to B to raise money on, B cannot sue A on that note; but if he endorses it to C, who discounts the note in good faith, knowing it, however, to be an accommodation note, and without valuable consideration, C can nevertheless recover the money from A. The maker may, therefore, have a defence against the payee which he cannot have against the endorsee, who has knowledge of that defence: 1 Pars. Con. 215. In addition to the authorities cited by this author, we may refer to *Moore vs. Baird*, 6 Casey, 138. That case decides that "the endorsee of an accommodation note may recover the whole amount of it from the maker, although he purchased it from the payee at a greater discount than six per cent." And this is true, though the holder at the time he purchased, knew that it was an accommodation note, and that there was no consideration between the maker and payee. This case decides every question raised by the affidavit of defence before us.

The subject is discussed at length in 2 Pars. on Con. 221, *et seq.* in the section on "Sales of Notes and other Choses in Action." See also *Fullweiler vs. Hughes*, 5 Harris, 440; *Lord vs. Ocean Bank*, 8 Harris, 384.

The maker of the note is called on in this action to do nothing

[*Original Edition, p. 387.]

more than he has promised. He has nothing to do with the fact that the holder of the note purchased it for a less sum than its face called for.

And now, March 8, 1875, it is directed that the rule be made absolute, and that judgment be entered in favor of the plaintiff for want of a sufficient affidavit of defence.

Court of Common Pleas, Schuylkill County.

DAVID G. YUENGLING vs. THE COMMISSIONERS OF SCHUYLKILL COUNTY.

Before the Court of Common Pleas can entertain an appeal for an increased assessment, there must be an appeal to the board of commissioners and a final decision by it.

Petition for an appeal by plaintiff from the increased assessment of two lots and brewery. February 1, 1875, motion on part of defendants to quash the appeal. Opinion delivered *March 8, 1875*, by

GREEN, J.—We think this application for an appeal from the decision of the commissioners as to the increased assessment of plaintiff's *property is premature, for the reason that the evidence before us shows that there has been no final decision of the commissioners as to this assessment. The notice of the increase was signed and given by the assessor, and the evidence clearly shows that the board of commissioners intended hearing an appeal from the increased assessment. No time was fixed for the hearing of an appeal, and no appeal has been made to the commissioners. Had such a time been fixed, and had the party then neglected to attend his appeal, he would have been deprived of the benefit of an appeal to the court. But no time for such an appeal having been fixed, we think that under the provisions of the act of assembly of April 16, 1834, sec. 16, Purdon's Dig., vol. 2, page 1361, pl. 27, Mr. Yuengling has a right to an appeal at any time before the payment of the tax. The section reads as follows: "It shall be the duty of the commissioners to hear appeals at any subsequent time when they may be in session, previous to the payment of the tax, and to make such alterations as they might have done on the regular day of appeal; provided," etc. Therefore, before entertaining this appeal, we think there must be an appeal to the board of commissioners, and a final decision by it, after which a party aggrieved may appeal to the Court of Common Pleas in accordance with the provisions of the act of assembly of May 10, 1871: Pamphlet Laws, 1871, p. 665. This case is readily distinguished from *Kimber vs. The County of Schuylkill*, 8 Harris, 366. The facts of that case show that there had been a final decision by the commissioners of the assessment, and therefore the appeal lay to the court. In the present case, as we have before said, there has been no such decision, and therefore the present application is premature.

An appeal to the commissioners may save any necessity for further litigation. If we were to entertain this motion for an appeal, at the present stage of these proceedings, it would establish a preo-

[*Original Edition, p. 388.]

edent that might be the source of much needless litigation hereafter.

The present proceeding is not an appeal, but a petition for an appeal, and for the reasons given we are constrained to disallow the same for the present.

Court of Common Pleas, Schuylkill County.

CHARLES KNIGHT vs. ROBERT HEINTZ and JOHN HANLEY.

Under the act of February 17, 1858, a leasehold interest in real estate is made the subject of a mechanics' lien for "all improvements, engines, pumps, machinery, screens, and fixtures put up by the tenants;" but this does not apply to every kind of leasehold. A dwelling house is not included. A description of a house and lot, as "situate on the west side of the railroad and road leading from Pottsville to St. Clair in said county," decided to be too vague and loose.

Query.—Whether a mechanics' lien which only claims a lien upon the building is sufficient to bind the property.

Rule to show cause why the mechanics' lien should not be stricken off for reasons appearing on the face of the record. Opinion delivered March 8, 1875, by

GREEN, J.—This claim is filed against a certain building, and "the lot or piece of ground on which said building is erected (is on ground rent and not the property of said defendant)," situate, etc., and the plaintiff "claims to have a lien on the said building, from the time of its commencement, for the sum specified according to the act of assembly," etc.

Does the lien set forth such an interest in the real estate as to make it a valid lien? If the lien intended to describe a technical ground rent, as it exists in this State, and that the defendants were the owners subject to such a ground rent, then there is no doubt that such an estate might be made the subject of a lien. The owners of such an estate are owners of the fee, and the property in the ground is in them. The owner of the ground rent has an estate of inheritance in the rent, the other has an estate of inheritance in the land out of which the rent issues: *Irwin vs. Bank of the United States*, 1 Barr, 349. But I think that the lien in asserting that the lot is not the property of the defendants negatives the idea that the defendants are the owners, subject to such a ground rent as we have described. If we give effect to all the words which describe the interest of the defendants in the lot, the result will be a leasehold interest. The act of February 17, 1858, Pamph. Laws, for 1858, p. 29, gives a lien to mechanics and material men against leasehold estates in the counties of Luzerne and Schuylkill for "all improvements, engines, pumps, machinery, screens and fixtures erected or put up by tenants of leased estates on land of others," but it has been decided that this does not apply to every description of leasehold. It has been held not to apply to private houses put up by tenants under their leases. The act has been extended by legislation to a large number of other counties. In *Schmidt vs. Armstrong*, 20 Pitts, L. J. 53, it is decided that the act does not embrace private dwellings erected by tenants independent of their works. See also

[*Original Edition, p. 359.]

Brick Machine Co. vs. Moore's Admr., 19 Pitts, L. J. 85. In the present case the lien simply described a two-story frame building, without reference to any purpose for which it is erected, and in this respect I think it is defective. A party to be entitled to the benefit of a lien must bring himself affirmatively within the provisions of the law giving the lien: *Barclay's Appeal*, 1 Harris, 497.

The house and lot are described as "situate on the west side of the railroad and road leading from Pottsville to St. Clair in said county." Such a description as this is as vague and loose as any that can be imagined. It gives scarcely any information whatever, and gives notice to nobody, particularly when we take into consideration that the lien asserts that the defendants are not the owners of the property. A great many loose and vague descriptions in mechanics' liens have been sustained by the Supreme Court, but none so entirely devoid of certainty as this. The present case more nearly resembles that of *Washburn vs. Russell*, 1 Barr, 499, where the property is described as "a double saw-mill in Clarion county, situate on the waters of the Clarion river and on the east side of the said river," in which the description was held to be too vague.

It is worthy of notice that the claim is filed against both building and lot of ground, but a lien is claimed only against the building. Whether such a restriction of the lien would be fatal, it is not at present necessary to determine. For the reasons already given, the rule to strike off the mechanics' lien is made absolute.

Rule absolute.

Supreme Court of Pennsylvania.

KIRBY vs. THE PENNSYLVANIA R. R. COMPANY, operating the Erie and Pittsburgh Railroad.

The act of April 4, 1868, enacting that persons engaged about the premises of a railroad company, although not employed by the company itself, should only have the same right to recover against the railroad for an injury as one of its employees would have, is constitutional.

Error to the Court of Common Pleas of Mercer County. Opinion delivered January 4, 1875, by

AGNEW, C. J.—The Sharon and Greenfield Railroad is a coal railway, terminating above grade near to a side track of the Erie and Pittsburgh Railroad. The cars of the latter are run out upon the side track to receive the coal from the former, by means of schutes from above. The plaintiff was employed, not by the Erie and Pittsburgh Railroad Company, or its lessee, but by others, to assist in running the coal through the schutes into the cars below standing on the side track. While so engaged, and standing on a car, directing the movement of the coal into the car, a train of cars laden with limestone, becoming disengaged from a locomotive drawing it away, ran off down grade, and entered the side track, the switch of which had been left open by the servants of the defendants running out the side track; the limestone train struck the coal cars standing on the side track with great violence, throwing the plaintiff off the

[* Original Edition, p. 390.]

car on which he was engaged, and injuring him badly. An action for this injury was brought against the Pennsylvania Company, the lessees operating the Erie and Pittsburgh Railroad. On the trial the plaintiff was non-suited *under the terms of the first section of the act of April 4, 1868, P. L. 58, in these words, "That when any person shall sustain personal injury, or loss of life, while lawfully engaged, or employed on or about the roads, works, depots and premises of a railway company, or in or about any train or car therein, or thereon, of which company such person is not an employé, the right of action and recovery in all such cases against the company, shall be such only as would exist, if such person were an employé. Provided, that this section shall not apply to passengers." Is this a valid law? Had the legislature the power to pass it? The case of the plaintiff evidently falls within its terms. The propriety of the law is not a question before us. If the legislature had the constitutional power to pass it, repeal is the only mode of annulling it. It may be considered that the natural rights of men, among them that of personal security, are guarded by the bill of rights, and "that all courts shall be open, and every man for an injury done him, in his lands, goods, person and reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." But in what respect does this law trench upon this guaranty, or indeed on any other in the constitution? The person to be affected by it, must be one lawfully engaged or employed on or about the road, etc. To be thus engaged he must be there by his own consent. He is therefore voluntarily there, to perform some act or business connected with the road, or its works. He knowingly assumes a relation regulated by the law, and thus places himself under the operation of the law which governs the relation. He is not bound to assume the relation, and when he does, he acts with his eyes open. The law is not retrospective, and takes from him no remedy for an injury already sustained. The relation he assumes is one of danger, and the fact of danger authorizes regulation by the State, as the conservator of the lives, security and property of her citizens. It is a police regulation, having respect to the general good, to forbid individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert his proper remedy against the person whose act or negligence does him the injury, the law says to him that the legal principle of respondent superior shall have no place in this particular relation; that as a matter of proper policy for the good of all, those who voluntarily venture into employment alongside of the servants of a railroad company, shall have just the same remedies, for injuries happening in the employment, that these have, and none other. In doing this, no fundamental right of the person thus voluntarily venturing, is cut off or struck down. The liability of the company for the acts or omissions of others, though they be servants, is only an offsprung of law. The negligence which injures is not theirs in fact, but only by imputation of law. *The law which thus imputes it

[*Original Edition, pp. 391 and 392.]

to the company, for reasons of policy, can remove the imputation from the master and let it remain with the servant, whose negligence causes the injury. It is unnecessary to refer to the long line of decisions asserting the general power of legislation when forbidden in the constitution. Finding no prohibition against such a regulation of persons lawfully engaged or employed upon a railroad or its works, the section quoted of the act of 1868 is not unconstitutional.

The judgment is therefore affirmed.

Court of Common Pleas, Schuylkill County.

MERCER MINING COMPANY vs. MCKEE, Administrator.

The defendant's intestate was the owner of coal land. He and the company entered into a contract for the coal, the company agreeing to pay therefor "the sum of ten cents for each ton (2240 lbs.) of screened coal, mined and removed from said land." Two screens were erected, one for "lump coal," and another for "nut coal," and both parties assented thereto, and the coal was shipped to market. The company resist the payment for "nut" coal on the ground that only "lump" coal was understood in the contract as coal.

Held, that whatever may be the relative value of the different grades of coal in the market, or the loss or profit on the same, the liability of the company to the defendant for the coal taken cannot be affected by it.

Error to the Common Pleas of Mercer County. Opinion delivered *January 4, 1875*, by

MERCUR, J.—The question here lies within a narrow compass. The defendant's intestate owned coal lands. He entered into a written agreement with the plaintiff in error, by which, *inter alia*, the latter was to have the coal thereon, and agreed to pay therefor "the sum of ten cents for each ton (of 2240 lbs.) of screened coal mined and removed from said land."

In this action the defendant in error claimed to recover for the coal only which the company had actually screened and removed from the land. The company showed that they had taken two sizes or kinds of coal. That in preparing it for market they used two screens; by the use of one they prepared "lump coal;" by the use of other "nut coal." They denied their liability to pay for the latter, and offered to prove that it was not known among coal dealers or miners as screened coal, in the general acceptance of that term.

It is unquestionably true, as a general rule, that the meaning of a term or name given to any particular article in a trade or business may be proved by persons engaged therein, when that term or name is used in a contract. This is admitted for the purpose of ascertaining the meaning with which the word was used by the parties. This rule of evidence is too well settled to be now controverted.

*The question here, however, is as to the application of this law to the undisputed facts in the case. The plaintiffs in error did screen the nut coal, and did ship it to market. They had no right to screen and remove any coal without paying for it. If the con-

[*Original Edition, p. 393.]

tention was whether the company had omitted to screen and remove the largest practicable quantity of coal for market, then the relevancy of the testimony offered would be evident. So if the defendant in error had denied the right of the company to screen the nut coal, and had forbidden its removal, the evidence would have been admissible. Here, however, the company had elected and determined what coal they would screen and remove. The defendant assented to it; he accepted and ratified the act; the minds of the parties thus met; the act of the company made it screened coal in fact; the defendant confirmed it; the company is now estopped from controverting it; they cannot now show that it ought not to have the name and character which their acts have given to it. Nor would evidence to prove that when the contract was made there was no market in that vicinity for nut coal, and that it did not pay the expenses of mining and marketing, change the result. Whether it was then and there in demand is unimportant. It has since been in demand and has been removed and sold. The question whether it was mined and marketed at a loss or at a profit to the company is wholly irrelevant. The contract recognizes no such distinction. The liability of the company to the defendant for the coal taken cannot be affected by it.

We see no error in the rejection of the testimony, nor in the answer and charge of the learned judge.

Judgment affirmed.

Supreme Court of Pennsylvania.

THE DANVILLE, HAZLETON & WILKESBARRE R. R. Co. vs. GEARHART *et al.*

In determining the damages of a property owner, whose land is appropriated by a railroad company for its road, evidence of the elements of computation of disadvantages, the manner the road cuts through the tract, the fields it spoils, the fencing rendered necessary, ditching, embankment, etc., is admissible to enable the viewers or the jury to reach a just conclusion upon the whole matter.

Error to the Court of Common Pleas of Northumberland County. Opinion delivered *February 8, 1875.*

PER CURIAM.—It has been held by this court in numerous cases that the true rule for determining the damages of a property owner, whose land is appropriated by a railroad company for its road, is the difference of value of his entire tract, as a whole, as it was before the railroad was laid upon it, and as it is or will be after the road shall have been completed. But it has never been said or held that the elements of computation are not to be given in evidence, as the means of enabling the viewers or the jury to reach a just conclusion upon the whole matter. So to hold would be to contradict the act authorizing the view and assessment. The act of February 19, 1849, known as the general railroad law, requires the viewers, after having viewed the premises, to estimate and determine the quantity, quality, and value of the lands so taken or occupied; and having due regard to, and making a just allowance

[*Original Edition, p. 394.]

for the advantages which have resulted, or may seem likely to result; and after having made a fair and just comparison of the advantages and disadvantages, they shall estimate and determine whether any, and, if any, what amount of damages has been sustained, and make report. There may be many disadvantages to be considered before a just idea of the value of the whole tract, after the road shall have been built, can possibly be formed—the manner the road cuts through the tract, the fields it spoils, the fencing rendered necessary, ditching, embanking, etc. To withhold the evidence of disadvantages is to disregard the act itself, and to prevent the viewers or jury from being able to compute the true value of the whole. The rule therefore contended for by the plaintiff in error is not infringed by admitting the evidence of those things which constitute elements in the final computation.

Judgment affirmed.

Court of Common Pleas, Schuylkill County.

COMMONWEALTH *ex rel.* D. B. ALTHOUSE, PRESTON MILLER and W. W. JONES, Commissioners, etc., *vs.* D. P. THOMPSON, treasurer and collector of Porter Township.

The appropriate functions of a mandamus are the enforcement of duties to the public by officers and others who either neglect or refuse to perform them.

An act of the legislature must violate some prohibition, either expressly or necessarily implied, either of the Federal or State constitution, before it can be pronounced by the judicial department unconstitutional and void. The court cannot pronounce a tax unconstitutional on the mere ground of injustice and inequality.

The legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, but the abolition of all remedies by a law operating *in presentis* is the impairing of the obligation of the contract, and therefore unconstitutional.

Alternative mandamus. Opinion delivered March 14, 1875, by PERSHING, P. J.—By an act of assembly passed the seventh of *April, 1869, the relators were appointed commissioners to lay out a State road in the counties of Schuylkill and Dauphin. This road was to be constructed at the expense of the individuals and companies owning or occupying lands through or contiguous or adjacent to said road, and this to embrace in Porter township, Schuylkill county, all the lands north of said road up to the north line of said township. This is followed by a proviso that the parties at whose expense the road is to be constructed shall not be compelled to contribute for that purpose any greater or other sum than the road taxes which may be assessed at the rate and in common with the lands and property of others, with an appropriation of all the road taxes thereafter to be assessed upon the lands mentioned, together with such other sums as might be advanced by said individuals or companies to the opening and construction of the road by the supervisors of the respective townships. See P. L. 738.

A supplement to this act, passed February 27, 1872 (P. L. 171), enlarged the power of the commissioners. They were empowered, instead of the township supervisors, to take charge of the construc-

[*Original Edition, p. 295.]

tion of this State road, and to let the same out on contract, in sections. For a proper understanding of the present controversy it seems necessary to quote the second section of this supplement at length. It is in these words: "The said commissioners, or a majority of them, shall receive from the township road-tax collectors and county treasurers all taxes already in, or hereafter to come into their hands, and any money advances that may be made by individuals or companies, which are applicable under the same act to the opening and construction of said road, and shall use and pay out the same in repaying any expenses incurred, or advances or outlays heretofore made by any individual or company, for the purpose and towards making the road under their contracts therefor aforesaid and otherwise; and any individual or company liable to the expense thereof under said act, who has heretofore advanced or expended any sums, or shall hereafter advance to said commissioners, or a majority of them, any sums to and for the opening and construction of the road, or of any portion or piece thereof, shall be credited with the same, and shall be entitled to and shall receive from the commissioners, or a majority of them, a certificate of the sums so advanced or expended; and each and all of such sums shall be repaid on each such certificate, with interest, through and by means of all the road taxes which are in and by said act directed to be appropriated and applied to the opening and construction of said State road, either by said commissioners receiving and paying over road taxes on such certificates, or by the road supervisors or collectors of road taxes in the respective townships, crediting the taxes as they are hereby required to do from time to time, and as requested by any individual or company, whose lands are liable on any such certificate or certificates, *or by both such methods, until all such certificates are paid off and the road is completed."

In their suggestion filed the commissioners set forth the act of 1869 and the supplement passed in 1872; their acceptance of the duties imposed and their compliance with the provisions of said acts of assembly. They state that "for the purpose of opening and constructing said road and paying the contractors therefor they loaned a large amount of money on certificates, or obtained an advance of large amounts of money for the purpose of making and opening said road," for which they "gave certificates of the sums so advanced according to the second section of the supplementary acts, and that there is now outstanding and unpaid a large number of said certificates which amount to \$25,000, or thereabouts, which certificates are now due and unpaid."

The relators further represent that David P. Thompson was the collector of road taxes in the years 1872 and 1873, for the township of Porter, and that during that time he collected in cash a large amount of taxes, which under the acts of assembly aforesaid, were applicable to the payment of the before-mentioned certificates, which taxes were collected by said D. P. Thompson upon and from the lands and other property which were appropriated for the opening of said State road, and subject to the redemption of said certificates; that prior to the time of the filing of the suggestion in this

[*Original Edition, p. 896.]

case, the relators demanded of said D. P. Thompson the payment to them of all the moneys collected by him from taxes assessed on the lands and other property appropriated to the making of said State road, and that said Thompson, in violation of his duty, has neglected and positively refused to pay over the same to the relators, and that for this they, the relators, have no specific legal remedy.

The appropriate functions of a mandamus are the enforcement of duties to the public by officers and others, who either neglect or refuse to perform them: 1 Wright, 279. Where a clear and specific duty is positively required by law of any officer, and the duty is of a ministerial nature, involving no element of discretion and no exercise of official judgment, mandamus is the appropriate remedy to compel its performance, in the absence of any other adequate and specific means of relief, and the jurisdiction is liberally exercised in all such cases: High's Extraordinary Legal Remedies, 26, where many cases are cited. The existence of a remedy by an action on the case against a public officer for neglect of official duty, does not supersede the remedy by mandamus, since such action can only afford pecuniary compensation and cannot compel the performance of the specific duty required, *Ib.* 19. Applying these general principles and taking into consideration the fact that the relators are officers deriving their powers directly from the legislature, we think they have a right to the alternative writ of mandamus issued at their suggestion, and that they have no other specific legal remedy. This answers the first and second divisions of the return and answer of the defendant.

The respondent, in his return, alleges that the acts of assembly of 1869 and 1872, whence the relators derive their powers, are unconstitutional and void. A number of reasons are assigned in support of this position. A discussion of this question would extend this opinion to an unreasonable length. Taxation has taken almost every shape, and within comparatively a few years many important cases on this subject have been determined by the Supreme Court of the State. We will content ourselves by a brief reference to a very few of the authorities.

An act of the legislature must clearly transcend the limits of the power confided to that department of the government, or more properly speaking, it must violate some prohibition either expressly or necessarily implied, either of the Federal or State constitution, before it can be pronounced by the judicial department unconstitutional and void: *Durack's Appeal*, 12 P. F. S. 491. The court cannot pronounce a tax unconstitutional on the mere ground of injustice and inequality: *Weber vs. Reinhard et al.*, 23 P. F. S. 370. To make an act of the legislature void, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt: *Sharpless vs. Mayor, etc.*, 9 H. 147. It must be remembered that a great deal of vicious legislation may be had within the boundaries of the constitution. The courts often find themselves unable to set aside acts of assembly on constitutional grounds, which they would be glad to repeal if they had a constitutional veto: *Commonwealth vs. Com. of Allegheny Co.*, 8 Casey;

[*Original Edition, p. 397.]

218. Every presumption is to be made in favor of the right of taxation. If the case is within the principle of taxation, the proportion of contribution and other details are within the discretion of the taxing power: *Hammett vs. Philadelphia*, 15 P. F. S. 146. An act of the Pennsylvania legislature was held to be unwise and unjust, but because it came within no express prohibition of the constitution it was sustained: *Satterlee vs. Mattheisson*, 2 Peters, 180. In short, a reference to the highest authorities will show that the legislation out of which the present controversy arises may be "unwise," "unjust," "unequal," "oppressive," "vicious," and still be "within the boundaries of the constitution."

It might not be proper for us to pronounce upon this legislation in any other way than judicially; and looking at it in that way, we cannot, "without doubt or hesitation" (9 H. *supra*), pronounce it unconstitutional.

Proceeding with the answer of the respondent, he admits that there is in his hands a balance of \$1,831, but denies that it is applicable to the making of said State road, and avers that the same is required to repair *the roads and bridges of Porter township; that the roads of said township are in a very bad condition, and that all the money of the township is required for their immediate repair.

In a proceeding of this kind it is an established rule that every allegation of a return must be direct, and must be stated in the most unqualified manner, not inferentially or argumentatively, but with certainty and plainness, 8 Cas. 218, 1 Wr. 237. The respondent admits he was the collector of road taxes for the years mentioned in the suggestion. Did no taxes come into his hands, which, by the acts of 1869 and 1872, were especially appropriated to this road? If not, he should have said so in plain terms. That the money in his hands is not applicable to this State road, may be a mere inference of his own, as he fails to furnish any facts which led to his conclusion. We must hold this part of respondent's return to be uncertain and evasive.

In the fourteenth paragraph of his answer, the respondent states that the said \$1,831 is deposited in the Government National Bank of Pottsville, and is claimed by C. Tower, in the case of the *Commonwealth ex rel. C. Tower vs. D. P. Thompson*, treasurer and collector of Porter township (the defendant), and the Government National Bank of Pottsville; that a mandamus issued to No. 523, March Term, 1873, which is now pending; that said C. Tower claimed the money in that proceeding under the authority of the present relators, and that until said mandamus is removed, the court cannot award a mandamus as asked for by the relators in this proceeding.

It will be seen by referring to the second section of the supplemental act of 1872, that the only duty imposed on the defendant as collector of road taxes, in relation to the certificates which the commissioners were authorized to issue, was that of crediting the road taxes on such certificates. The alternative mandamus to No. 523, March Term, 1873, was to compel the collector not to credit taxes, but to pay money on certificates held by C. Tower, *Req.*, who was

[* *Original Edition*, p. 298.]

the relator in that case. The court held that this was outside of the collector's authority, the power to pay money on such certificates being conferred on the commissioners, and gave judgment for the respondent. We regard that proceeding as at an end. If it were not, its pendency would not operate as a plea in abatement as this case now stands. Pendency of another suit for the same purpose would be a good plea in abatement for mandamus, but defendant cannot rely on that plea, and at the same time ask judgment of the court on the merits of the controversy by setting up the facts on which he relies, as showing that upon the merits a peremptory writ should not issue. By adopting this course, he submits his cause to the judgment of the tribunal, and waives his plea in abatement. High on Mandamus, 322.

*We think it unnecessary to refer in detail to the other matters contained in the answer of respondent. In all that is said about the extensive powers intrusted to the relators as commissioners, and the want of proper guards around the legislation to which they owe their legal existence, we agree. How far the official acts of officers of this kind are exempt from the control of the usual judicial tribunal may be seen from the case of the *Phoenixville Road*, 2 P. F. S. 106. In that case the act of assembly was alleged to be "a fraud upon the community," and Judge Chapman, in his opinion, declared that "errors were committed by the commissioners which imperatively called for the interference of the court." The Supreme Court held "that there is no act conferring a general power to revise the proceedings of the commissioners appointed to lay out State roads, under special acts of assembly. Deriving their powers from the special law, these commissioners are wholly governed by its provisions."

The law in this case directs the relators to receive from the defendant, as tax collector, certain taxes. The duty on the part of the respondent to pay them is purely ministerial, and we can find no sufficient reason why he should not perform it, unless he is exonerated by the act of assembly passed June 9, 1874. This act repeals the third section of the act of 7 April, 1869, and the whole of the supplemental act of 1872. It leaves in force the first and second sections of the original act by which the relators were appointed commissioners for laying out this State road, but strips them of the power to make contracts for the making of the road, issuing certificates of indebtedness, and receiving from the tax collectors and county treasurer certain taxes to be used in the payment of certificates issued by them. The effect of this repealing statute upon the present legislation was argued at length. It was passed after the present proceeding was instituted in court, and, of course, after the commissioners had issued the certificates mentioned in their suggestion. If the repeal has the effect claimed for it by the respondent, then the holders of these certificates have no remedy by which they can enforce their payment. We have had little difficulty in coming to the conclusion that the repealing act of June 9, 1874, cannot affect certificates issued prior to that date. Where one statute is repealed by another statute, acts done in the mean-

[*Original Edition, p. 399.]

time, while it was in force, shall endure and stand and be good and effectual: Dwarria and Statutes, *675. It is settled by a long roll of cases that the legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, but that the abolition of all remedies by a law operating *in presenti* is an impairing of the obligation of the contract, and therefore unconstitutional. The laws of the State in force at the time are a part of the law of the contract as to rights and remedies *without any express agreement by the parties. These rights are annexed to the contract at the time it is made, and form a part of it, and any subsequent law impairing the rights thus acquired impairs the obligations which the contract imposes: *Bronson vs. McKinzie*, 1 How. 311. A good illustration of this point is furnished by the case of *Woodruff vs. Trapnell*, 10 How. 90. In 1836 the State of Arkansas chartered a bank, the whole capital of which belonged to the State. The 28th section made the bills and notes of the bank receivable for debts due the State. In January, 1845, this 28th section was repealed. It was held that the notes of the bank in circulation at the time of the repeal were not affected by the repeal, and that a tender in 1847 of notes issued prior to the repeal in 1845, was good to satisfy a judgment against a debtor obtained by the State. In *Howard vs. Bugbee*, 24 How. 461, it was held that a statute which authorized the redemption of mortgaged premises in two years after a sale under a decree, by *bona fide* creditors of the mortgagor, was void as to sales made under mortgages executed prior to the statute.

In the *Hickory Tree Road*, 7 Wright, 139, a road view was presented and confirmed *nisi* by the court, after which the road law under which it was made was repealed. This left no remedy for damages. The Supreme Court held that the final confirmation of the road, and proceedings to assess damages, must go under the old law as though it had not been repealed.

To take away by legislative act the existing remedies for enforcing the obligation of the contract, so as to leave the creditor without redress, would be a mockery of justice, and repugnant to the Constitution of the United States. The better doctrine is that all effectual remedies affecting the interest and rights of the owner existing when the contract was made, became an essential ingredient in it and are parcel of the creditor's right, and ought not to be disturbed: 1 Kent* 419, note. As bearing on this branch of the case, we might refer to *Fletcher vs. Peck*, 6 Cranch, 87; *Green vs. Biddle*, 8 Wheaton, 1; *Quackenbush vs. Danks*, 1 Denio, 128; *Billmeyer vs. Evans*, 4 Wright, 324.

As the result of a careful examination of this case, we are compelled to decide that the answer of the respondent is insufficient, and we therefore award a writ of peremptory mandamus against him.

[*Original Edition, p. 400.]

*** Supreme Court of Pennsylvania.****WESLEY BROWN vs. ADAM SCHOCK.**

The rules of evidence are the same in civil and criminal cases when they pertain to questions which must be the same in their nature.
In this case the question of identity was properly submitted to the jury.

Error to the Court of Common Pleas of Schuylkill County.
Opinion delivered March 8, 1875, by

AGNEW, C. J.—The question in the court below was upon the competency of the evidence contained in the bill of exceptions. Was Brown, the plaintiff, the same person as the man called Brown who accompanied Simpson in his rounds while perpetrating a series of frauds upon citizens of Schuylkill county? This was a question of fact for the jury, and might be proved by circumstances, just as in any other question of identity. The rules of evidence are the same in criminal and civil cases when they pertain to questions which must be the same in their nature. Whether a particular man perpetrated a fraud or a crime is an inquiry precisely the same in its nature in all cases, to wit: a natural conclusion from the facts proved. In the proof of the circumstances from which the conclusion is to be drawn the evidence must often proceed step by step. No one witness may be able to prove all the facts, or indeed, more than a single fact. Hence to exclude every fact or circumstance, because it does not of itself make out the proof, is simply to decide that circumstantial evidence cannot exist in the case, where the purpose is to prove identity. Here we have a case where two men passed through the country selling a patent right for a washing machine, riding in the same two-horse carriage, and using certain blank forms as the instrumentality for perpetrating their frauds. One of these called his fellow Brown on two separate occasions and under circumstances tending to show that the name rose spontaneously to his lips. The plaintiff bears the same name, and is found in possession of the fruits of the fraud. He accounts for this possession by a formal transfer from Simpson, a known confederate with the man Brown, who was with him. The witness called to prove the transfer is his own father-in-law, and the account he gives is that Simpson brought in fourteen or fifteen of these notes, asked Brown to buy them, and said they were good. Brown said he was willing to buy good notes, took them all without inquiry into the circumstances of the drawers, paid eighty per cent. for them, and did not protest the notes to hold the endorser. Then Brown brings suit on some of them. The evidence of identity was objected to, is received by the court, and Brown is so informed by his counsel, and this case is continued several times to procure his attendance. He refused to appear, and *his refusal is put now on the ground that he was informed by his counsel and believes himself that the testimony of his identity was illegal. Supposing that to be an honest opinion, yet it did not detract from the *prima facie* effect of his declining to appear as evidence against him. If he had a strong

[*Original Edition, pp. 401 and 402.]

motive to appear and would not, he leaves himself open to suspicion. The question is not upon his right to stay away, but upon the motive which may have caused his absence. A man of ordinary intelligence must know that his failing to appear when he had a strong motive to appear, would be evidence against him. If he relies upon his ability to disprove the motive imputed, he takes the risk, but he leaves the effect of his conduct as a matter of evidence for the opposite side to go to the jury, who must weigh both sides to determine the real motive. If he knew he was not the Brown who accompanied Simpson, the accomplice, his motive was very urging to appear, and by his presence convince the witnesses that he is not the same person called Brown, who accompanied Simpson. Omitting to do that by which he could at once dissipate doubt, he leaves his motive to be determined by the jury, assuming the burden of disproving it by his rebutting testimony. Therefore we cannot say the circumstances, as evidence for the defence, are to be taken away from the jury. In such a case it is evident there can be no difference because the note is negotiable. The evidence here does not concern the note, but the identity of the person holding the note. Herein is the precise difference between this case and *Phelan vs. Moss*, 17 P. F. Smith, 59. There the question was whether the *bona fides* of the holder was destroyed by taking the note at a large discount under suspicious circumstances. Here the question is whether the holder is the identical person who aided in the perpetration of the fraud which avoids the note. In the former case it was a question of mere good faith in the purchase. Here it is the identity of the person who committed the fraud itself. Here the manner of purchase is only a link in the series of facts tending to prove that the holder is one and the same person with the one who committed the fraud.

In a question of circumstantial evidence, the proof derived from the circumstances is a question of natural presumption, and is to be found by the jury. The strength of this proof depends on the probability resulting from the facts. The presumption thus arising, being a natural one, is to be determined necessarily by the jury, and not by the court. It is the right of the party to have this submitted to the jury, unless it be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances. If in such a case as this we say that all the combined circumstances afford no evidence, we take from the party the right of trial by jury, a right of the utmost importance in *a matter in which the natural instinct and judgment of men are the legal and constitutional right of a party.

Judgment affirmed.

Court of Quarter Sessions, Schuylkill County.

IN THE MATTER OF THE REPORT OF VIEWERS APPOINTED TO WIDEN
NORWEGIAN STREET IN THE BOROUGH OF POTTSVILLE.

1. The Court of Quarter Sessions of Schuylkill county has jurisdiction to lay out streets and roads in the borough of Pottsville.

[*Original Edition, p. 403.]

2. When the first day of the term of said court fell on Monday, June 1, it was held that a report of viewers opening a street, filed on June 22, was in time.
3. After the width of a road is fixed by the court, one term should intervene before the report is confirmed, to allow time to file exceptions, or ask for a review.

Exception to the confirmation of the report. Opinion delivered March 22, 1875, by

WALKER, J.—The exceptions to the confirmation of this report, are:

1st. The petition was not presented to the town council for approval.

2d. The Court of Quarter Sessions has no jurisdiction to appoint viewers to lay out streets in the borough of Pottsville.

3d. That the viewers failed to report to the next term of the court as required by law.

4th. The court failed to fix the width of the proposed road at the time of confirming the report *nisi*.

1st. As to the first exception. The act of April 2, 1872 (Pamp. Laws, p. 723), requires the petition for viewers to be first presented to the town council for their approval.

Whether this was done does not appear in evidence. But the record shows that notice of the time and place of the meeting of the viewers was served more than ten days previous upon the town council, supervisor, town clerk and auditors of the borough, and accepted in writing by them.

Their acceptance of the notice may be considered as a waiver of their privilege to approve first of the petition; especially as they appear before us through their solicitor, and ask for the confirmation of the report.

This objection therefore does not lay in the mouth of a stranger to make.

2d. As to the jurisdiction of the Quarter Sessions to lay out roads in the borough.

*The 1st section of the act of June 13, 1836 (Pur. Dig. 1272, Pl. 1, Pamp. Laws, 1836, p. 555), confers upon the Court of Quarter Sessions, of every county in the State, the authority upon petition to grant a view for a road in the respective county for the purpose of laying it out. The power is universal within the limits of the county, and extends as well to incorporated towns as to rural districts: 8 C. 361; 2 Brew. 599.

The borough charter contains nothing inconsistent with this act, so as to exclude the jurisdiction of this court.

The act of April 22, 1856 (P. L. 509), confers upon the town council of the borough of Pottsville authority to lay out, open, widen and straighten streets, lanes and alleys, but does not repeal the jurisdiction of the Quarter Sessions, and the act of April 2, 1872 (P. L. p. 723), clearly recognizes this authority.

In the matter of Callowhill St., 8 C. 361, it is decided that the Court of Quarter Sessions has jurisdiction to lay out and open new streets in Pottsville, unless clearly excluded by the provisions of the charter.

See also *Borough of Mercer Case*, 14 S. & R. 447; *Sharell's Road*, 8 Barr. 89; *Newville Road Case*, 8 Watts, 172.

In the *Euston Road Case*, the jurisdiction of the Quarter Sessions was expressly excluded, 3 Rawle, 195.

Under these authorities we see nothing in this exception.

3d. As to the third exception. The record shows that on May 4, 1874, the viewers were appointed and that they presented their report to the court on June 22, 1874.

The act of 1836 requires them to report at the next term of the Court of Quarter Sessions.

When this is not done (and there is no continuance), the report is irregular and void: *Chartier Tp. Road*, 12 Wr. 314.

And the filing of the report in the clerk's office is not reporting: *Baldwin & St. Clair Road*, 12 C. 9. It must be presented to and approved by the court: *Gibson & Guy's Mile Road*, 1 Wr. 255.

The material question here is: Was this report presented to, and approved by the court, at the next term?

The act of April 5, 1849, (P. L. 368, Sec. 4), provides that the respective courts shall be held in the county of Schuylkill on the first Mondays in March, June, September and December, four weeks.

This fixes the respective terms of the Common Pleas: *Horton & Heil vs. Miller*, 2 Wr. 270.

The act of April 13, 1855 (P. L. p. 374), provides that the Courts of General Quarter Sessions of the Peace, and the Courts of Oyer and Terminer and General Jail Delivery, holden in the county of Schuylkill, *shall commence on the first Monday of the several terms of the courts for said county, to continue three weeks, if necessary, etc.

Under this act it is evident that the next Court of Quarter Sessions (after the appointment of viewers in this case, and to which their report was to be made) commenced on Monday, June 1, 1874.

Under our rule of court four weeks are allowed to file reports of viewers, and although no rule of court can be enforced contrary to an act of assembly, yet the rule must be regarded as a special order of continuance in each respective case. For, under the act of 1834 (P. Dig. 1199, Pl. 7 and 8) the judges may hold special and adjourned quarter sessions, as often as occasion shall require.

Had there been a motion to continue the order the matter would have been free from doubt and beyond controversy.

It is admitted that a general order of court fixing the width of roads cannot be made: 1 Barr, 356; 4 Barr, 337.

For all roads cannot be laid out and made of the same breadth. Location and travel must determine that, and therefore it becomes a matter of judgment and discretion: *Shaefferstown Road*, 5 Barr. 515.

Also notice to the landowners of the extent of their ground taken is important. We therefore think that a general order may be made for holding special and adjourned courts for road cases.

But the act of 1855 provides that the Court of Quarter Sessions shall be held three weeks if necessary.

[*Original Edition, p. 405.]

If this term means three full and entire weeks, or 21 days, then the last day would fall on the 22d of June, the very day upon which this report was presented to, and approved of, by the court.

To ascertain this we must resort to the rule adopted by the Supreme Court for the computation of time.

There is a distinction between the English and Pennsylvania mode of computation of time. The former have placed upon it a strict construction, while the current of our authorities is to give it a liberal one.

In *Sims vs. Hampton*, 1 S. & R. 411, it was held, in computing the 20 days allowed for an appeal from the award of arbitrators, the day on which the appeal is entered is excluded.

The same principle has been decided in *Browne vs. Browne*, 3 S. & R. 496.

In *Goswiler's Estate*, 3 Pa. Rep. 201, the court decided that when a rule of court or an act of assembly gives a number of days to do some act, and the last day fall on a Sunday, it may be done the next day. This is affirmed in *Duffy vs. Ogden*, 14 P. F. S. 240. So under the act of March 26, 1827, the five years from the day of the entry of the judgment (within which it must be revived by *scire facias*) are exclusive of the day *on which the judgment was entered: *Green's Appeal*, 6 W. & S. 327. See also *Lysle vs. Williams*, 15 S. & R. 135.

So also under the act regulating distress for rent, and the right of the tenants to replevy the same, in computing the time in which the tenant may replevy, the day upon which the distress is made is excluded, and if the 5th day be Sunday, the following Monday will be estimated as the fifth day: *McKinney vs. Reader*, 6 Watts, 37; *Brisben vs. Wilson*, 10 P. F. S. 452.

In an award in replevin where the 20th day falls on a Sunday it was held that the appeal was properly taken the next day: *Harker vs. Addis*, 4 Barr, 515. Sunday is not a judicial day.

In *Gass vs. The Schuylkill Iron Company*, 2 Foster, 241, this court held, in calculating the thirty days allowed by law to enter bail for a stay of execution, that the day on which the judgment is entered is excluded.

In *Cromlien vs. Brink*, 5 Casey, 525, Judge Porter reviews the whole question of time, applying the same rule when two years are given to redeem land, as when days are mentioned in the statutes.

This decision, therefore, is most important, as there is no good reason why the rule should be different when weeks are mentioned in a statute, or rule of court.

This last decision is affirmed in *Marks vs. Russel*, 4 Wright, 372, where it is held that in computing the time to plead on ten days' notice, the day on which the notice is given must be excluded, and if the last day fall on Sunday, that is also excluded.

In *Menges et al. vs. Frick*, 23 P. F. S. 140, it is held that when suit is brought within six years after the day on which the cause of action arose, that day is to be excluded from the computation.

And it is there also said "that when a thing is to be done within a certain time from a prior date, and the party is deprived of a right

[*Original Edition, p. 406.]

by its omission, the day from which the count is to be made is excluded from the computation." If it be said that the act of 1855 only requires the Quarter Sessions to be held three weeks if necessary, and in a case where the court only sat two weeks and three days, and then adjourned, a report of viewers filed next day would be too late, although the three weeks had not expired, this is no doubt true.

But in this case the record shows that the Court of Quarter Sessions commenced on June 1, and continued in session every day except Sunday, up to Saturday, June 20, when it adjourned over to Monday, June 22.

In *Spring Brook Road*, 14 P. F. S. 453, Judge Sharawood says the term expired on Saturday, and he also says that it is not unusual to hold an *adjourned session on the Monday succeeding the term in order to wind up business. This was literally true in this case.

If this was not strictly an adjourned court it was an enlargement of the term for road purposes.

4. The remaining exception is that the width of the street was not fixed by the court.

This is an irregularity which will prevent the final confirmation of the report unless another term (after the width is directed) be given to file exceptions or ask for a review.

This report cannot now be confirmed, for it would be error, and if removed into the Supreme Court, that court would remand the record to us to fix the width, and allow time until the next term to file exceptions or ask for a review: *Clowes' Road*, 2 Grant, 129; *Charleston Road*, 2 Grant, 467; *Road in Pitt Township*, 1 Barr, 356; *Road in Whitemarsh*, 5 Barr, 101.

The exceptions are therefore overruled, and the following order is made:

And now, March 22, 1875, the exceptions filed in this case are overruled, and the court direct the breadth of Norwegian street to be thirty-seven feet six inches from Sixth to Twelfth street in the borough of Pottsville, and approve of the same, and the assessment of the damages. And the court do further order and direct that these proceedings be not entered of record, nor the street (of the width aforesaid) be taken, deemed or allowed to be a public highway until the next term of the court hereafter, in order to allow time to any one aggrieved to file exceptions to the confirmation of this report, or to ask for a review under the provisions of the acts of assembly relative thereto.

Court of Common Pleas, No. 4, of Philadelphia.

***In re* Application for the Incorporation of "THE ENTERPRISE MUTUAL BENEFICIAL ASSOCIATION."**

1. It must appear by petition or affidavit that at least three signers of articles of incorporation are citizens of Pennsylvania.
2. The articles must show the place where the business is to be transacted; the location of its office is not sufficient.

[*Original Edition, p. 407.]

3. Notices of application for charter must be published in the *Legal Intelligencer* and two general newspapers.
4. Such notice should specify particularly the time and place of such intended application.

Opinion delivered *February 20, 1875*, by

LUDLOW, P. J.—Articles of incorporation of the first class were *presented to one of the judges of this court under the act of assembly of April 29, 1874, for approval. We are obliged for the present to withhold our endorsement for the following reasons:

1. It does not appear that of the five persons who have subscribed, *three are citizens of this Commonwealth*. The act of assembly (sec. 3) is imperative, and the fact should appear by petition for the intended charter, or by an affidavit added to it. How, in the instance before us, can we know that the persons subscribing are not citizens of another State or foreigners?

2. In the paper before us, article 3 reads thus: "The place where its office is to be located is in the city of Philadelphia."

The act of assembly requires "the place or places where its business is to be transacted to be designated." The intended charter is defective in that it specifies no "place" of business within the meaning of the act. An office may be located in one city, and the real "place of business" may be in another Commonwealth. We must be satisfied upon this point that the act of assembly has been substantially followed before we endorse and approve any charter.

3. The act of assembly requires notice of an application for a charter to be published in "two newspapers of general circulation." The notice in this case has been published in one newspaper of general circulation, and in the *Legal Intelligencer*.

The evident object of this requirement is to give notice to the general public of applications, which are matters of general concern, and to give as wide circulation as is consistent with a due regard to expense it is confined to two newspapers of general circulation.

The publication in the *Legal Intelligencer*, under the act of 1855, is for another purpose, equally important, to wit, to provide one convenient medium in which *members of the bar* and others interested in any proceedings in the courts may look for LEGAL NOTICES with certainty. These notices should, therefore, be published in two newspapers of general circulation, as well as the *Legal Intelligencer*.

Again, the notice in this case does not specify the time or place, when and where the application will be made.

The act does not seem to contemplate a hearing in court, but before any judge at chambers. The notice should, we think, be so complete as to enable parties interested, and desiring to object, to do so without inquiring of every one of the twelve judges of the several Courts of Common Pleas.

Approval, for the present, of this charter must be declined.

[*Original Edition, p. 408.]

INDEX.

VOL. II.

ACCOUNTS.

1. After twenty years it is the presumption that an administrator's account is duly settled, and the burden of proof is on the complainant to overthrow this presumption. *Bentley's Estate*, 6.

2. Where accounts are multitudinous the witness may be allowed to refresh his recollection by means of other accounts and papers as to the items. *Alleghany Insurance Co. vs. Hanlon*, 270.

ACTS OF ASSEMBLY.

- 1770, February 24. See PARTITION.
- 1806, February 24. See JUDGMENTS.
- 1806, March 21. See PROMISSORY NOTE.
- 1807, April 13. See STRAY CATTLE.
- 1810. See COMMON PLEAS.
- 1810. See JUSTICE OF THE PEACE.
- 1814. See JUSTICE OF THE PEACE.
- 1814. See COMMON PLEAS.
- 1830. See MORTGAGE.
- 1832, March 15. See ISSUE.
- 1832, March 29. See MARRIED WOMEN.
- 1834, April 15. See COMMISSIONER.
- 1836, March 21. See PARTNERSHIP.
- 1836, June 14. See QUO WARRANTO.
- 1836, June 16. See INQUISITION.
- 1836. See LIEN.
- 1842. See BAIL.
- 1846, April 8. See INJUNCTION.
- 1848, April 11. See MARRIED WOMEN.
- 1849, January 24. See LIFE ESTATE.
- 1851, April 14. See CONSTITUTION.
- 1852, May 4. See SERVICE.
- 1853, April 18. See DECEDENTS' ESTATE.
- 1854, May 8. See TAXES.
- 1858, February 17. See MECHANICS' LIEN.
- 1860, March 31. See COSTS.
- 1860, March 31. See TALESMEN.
- 1860. See ROADS.
- 1861, April 18. See EXEMPTION.
- 1862, April 11. See RAILROADS.
- 1864, May 4. See TAXES.
- 1865, February 17. See TAXES.
- 1866, February 23. See TAXES.
- 1868, April 4. See RAILROADS.
- 1869, April 9. See STATE STREET.
- 1869, April 20. See DECEDENTS' ESTATE.
- 1869, April 20. See WIDOW.
- 1869. See WITNESS.
- 1869. See POLICY OF LAW.
- 1870. See WRIT.
- 1871, May 10. See INJUNCTION.
- 1871, January 2. See STATE STREET.
- 1872, April 3. See PRACTICE.
- 1872, April 3. See WITNESS.
- 1872, April 9. See MECHANICS' LIEN.
- 1874, April 29. See CHARTER.

[*Original Edition, p. 409.]

(375)

•ADJOINING LANDS.

No one will be permitted so to excavate his land as to do a permanent injury to the land of his adjoiner, when such adjoiner's land is in its natural condition, or the injury thereto would result notwithstanding and without artificial pressure thereon. *Bell and Weir vs. Reed*, 266.

ADJOINING OWNERS.

A fence that is not on the line, but has been put entirely on the property of the adjoining owner by him, is under his complete control. *Smith vs. Johnson*, 270.

ADMINISTRATRIX.

An administratrix sold and assigned a judgment which was good and collectable for the amount of the principal alone, and failed to show that she did so in good faith and under the belief that she was doing the best for the estate. *Held*, that she should be charged with the full value of the judgment, principal and interest, at the time of the transfer. *Williams' Estate*, 320.

AFFIDAVIT.

1. In a proceeding by a landlord to recover possession, the affidavit was signed "A per B, Agent." *Held*, to be the affidavit of bond sufficient proof. *Gavit vs. Hall*, 170.

2. The notice should be given after the maturity of the note, and reasonable time to proceed should be allowed, and the affidavit should state with certainty all the material facts required. *Donough vs. Boger et al.*, 195.

3. Judgment for want of an affidavit of defence may be taken twenty days after the return day, except where the twentieth day falls on Sunday, when the whole Monday following is allowed. *McPhilips vs. Pennsylvania Cattle Insurance Co.*, 248.

4. Where suit is brought on a promissory note, an affidavit of defence which alleges a payment by the defendant of part of the amount, and that thereupon the plaintiff agreed to cancel and surrender the note, is not sufficient. *Kirkpatrick vs. Wensel*, 279.

See *KIRKPATRICK vs. BIEVER*, 272.

AGENT.

1. An agent may appear before a justice and take an appeal. The justice is the judge of the agent's authority, which, it must be presumed, was satisfactorily shown. *Jones vs. Delaware and Hudson Canal Co.*, 159.

2. An affidavit for the removal of a cause in which a corporation is a party, may be made by the agent or employé of the corporation. *Vankirk vs. Penna. R. R. Co.*, 165.

3. To hold non-resident defendants by a service on an alleged agent, the return of the officer must show that he complied with the act by serving the summons at the place, or one or other of the places mentioned in the act. *Yeich vs. Peterson & Carpenter*, 249.

See EVIDENCE.

AGREEMENT.

Where there is an agreement to refer to arbitrators in an action pending, consent to make it a rule of court will be implied. *Shisler vs. Keary*, 39.

ANCIENT PAPER.

An ancient paper is not only one of great age, but it must come from the proper authority to be admitted. *Rodgers vs. Riddlesburg Coal Co.*, 240.

APPEAL.

An appeal from the judgment of a justice of the peace may be dismissed, even after an arbitration, where it appears that the amount in controversy exceeded the jurisdiction of the justice. *Baer vs. Garrett*, 193.

See AWARD OF ARBITRATORS, RECOGNIZANCE AND INJUNCTION.

APPOINTMENT OF VIEWERS.

Upon presentation of petition asking for the appointment of road viewers for a double purpose after their appointment, the Court of Quarter Sessions has full power to allow such amendments in said petition as will remedy defects. *Road in Hempfield Township*, 151.

See RAILROADS.

[*Original Edition, p. 410.]

ARBITRATORS.

1. A rule to arbitrate, on which arbitrators have been chosen, cannot be stricken off until the day of meeting has gone by. It is error to strike off on the day of meeting.

2. The practice and authorities relative to arbitration rules examined. *Trimbley vs. Maloney*, 118.

See AGREEMENT AND HUMMEL AND WIFE vs. JESSE FOSTER, 218.

ASSESSMENT. See INSURANCE.***ASSIGNMENT.**

1. The decedent executed an assignment, sealed it up in an envelope, and placed it in the fire-proof of the firm, of which he was a member. Upon the outside of the envelope he wrote the name of the assignee, adding, "Please send this to him on my death." After his death it was found in the fire-proof. *Held*, not to be a gift, or to create a trust in favor of the assignee, as there had been no delivery. *Taylor's Appeal*, 76.

2. An assignment of part of a debt to arise for wages not yet earned against any person by whom the assignor might be employed, although the employer have notice of the assignment, is insufficient, without acceptance, to make a valid transfer of the debt against the employer. *Jermyn vs. Moffitt*, 169.

ASSIGNOR.

An assignor for benefit of creditors, reserving the benefit of the exemption act, is entitled to select out of what property he pleases. The appraisers of the assigned estate must appraise what he retains. It is not laches for him to wait until the sale of realty in which he had an undivided interest and then claim his exemption out of its proceeds. *Peterman's Estate*, 213.

ASSOCIATE JUDGES. See JURISDICTION.**ATTACHMENT.** See STATUTE OF LIMITATIONS.**ATTEMPT TO VOTE ILLEGALLY.**

1. All attempts to commit misdemeanors are indictable at common law.

2. Under the Pennsylvania law an attempt to vote illegally is indictable, as well as the actual commission of the offence. *Commonwealth vs. Jones*, 238.

ATTORNEYS' DUTIES.

1. Gross misconduct on the part of an attorney acting in his official capacity is a sufficient cause for striking him from the roll, although the person whom he injures be not a client.

2. Good faith, more than skill or intellect, is essential to the profession of the law. *In re Orwig*, 28

See EVIDENCE.

AUDITOR.

1. An auditor has no power to open or set aside a judgment. To him it is conclusive, and if creditors would attack it, they must resort to the proper court for that purpose. 6 *Rice vs. Railroad Co.*, 17.

2. County auditors are clothed with extensive powers, to enable them to correctly audit, adjust and settle the accounts of the several officers subject to their supervision.

3. When the report of the county auditors has been filed in the proper office, it is final and conclusive, and the auditors have no further power over it.

4. Appeal from the account of the auditors as filed is the only way in which the action of the court can be invoked. *Auditors vs. Commissioners*, 45.

5. The finding of an auditor, upon the evidence submitted before him, unless very plain mistake is shown, will be considered as conclusive, especially where his finding has been approved of by the court below. *Brown vs. Thomas & Blandy*, 162.

6. It is the duty of any person desiring an issue to reduce his request to writing, and to present the same under oath to the auditor. *Morgan's Estate*, 194.

AWARD OF ARBITRATORS.

1. An award of arbitrators that exceeds the sum claimed in the several counts of the narr, but is not greater than the amount of damages claimed, will not be disturbed. *Graham vs. Walker & Co.*, 51.

[*Original Edition, p. 411.]

AWARD OF ARBITRATORS—(Continued).

2. It is the duty of a party taking up an award of arbitrators to file it in the prothonotary's office, without unnecessary delay. Where he wilfully retains it in his possession over twenty days, he loses his right of appeal by his own default. *Mortimer vs. O'Reagan*, 243.

See **SHERIFF**.

BAIL.

The act of 1842 abolishing imprisonment for debt does not prevent bail from another State arresting his principal in this State, upon a bail piece, and taking him out of the State. *Mason's Petition*, 109.

See **RECOGNIZANCE AND STAY OF EXECUTION**.

BAILEE. See **LACHES**.

BEQUEST. See **WIDOW**.

***BILL.**

1. A title which calls the bill a supplement to another bill, which has no other title than of the same kind, a supplement to an original bill, does not *clearly* express the object of the law, and imparts no information to the legislature which is called upon to enact it.

2. The act of January 2, 1871, entitled "A further supplement to the act incorporating the city of Harrisburg, in the county of Dauphin, passed April 9, 1869," is defective in title, contains several distinct subjects and is unconstitutional and void. *In re State Street, Harrisburg*, 1.

BONDS.

1. The master should consider and settle the titles of adverse claimants to bonds.

2. Where bonds are pledged as collateral, the holders have a right to receive the full amount of the bonds, and not only the face of their claims with interest, unless subsequent creditors can show a resulting interest in their debtor. The holders must be left to account to their principal for any balance that may be over the amount due to themselves.

3. A bond of this character, though not a technically negotiable paper, is practically so for all purposes of commerce. They pass by delivery, and may be sued by the holder in his own name. The burden of proof, therefore, is upon the party who alleges that they were not received in the ordinary course of trade, and for a valuable consideration. *Rice vs. Railroad Co.*, 17.

4. A peremptory non-suit on a sheriff's interpleader is such a determination of the issue as will operate to forfeit the bond if the goods are not forthcoming. *O'Neill et al. vs. Will*, 72.

5. A bond in \$2,000 conditioned that Dr. B. shall not practice medicine in a certain locality, is not to be considered as liquidated damages. *Bigony vs. Tyson*, 212.

See **SURETY AND MORTGAGE**.

BOUNDARY. See **INJUNCTION**.

BROKERS.

The proceeds of the sale of a seat in the Board of Brokers of a member who failed to settle with his creditors, when sold under the articles of association of the board, are first applied to his creditors in the board. *Leech vs. Leech*, 190.

CASES CONSIDERED.

Bank vs. Smith, 12 P. F. Smith, 47. *Scott vs. Bank*, 69.
Clark vs. Thompson, 2 Jones, 274. *Brown vs. Bennett*, 132.
Commonwealth vs. Keenan, 30 Leg. Int., 417. *Commonwealth vs. Mages*, 42.
Forster vs. Bank, 17 Mass. 478. *Scott vs. Bank*, 69.
Pennsylvania Co.'s Appeal, 31 Leg. Int., 69. *Stille's Estate*, 349.
Saller vs. Rice, 1 Leg. Chron., 116. *Burke's Appeal*, 116.
Shaffner vs. Commonwealth. *Brown vs. Commonwealth*, 180.

CERTIORARI.

1. A certiorari must be applied for within a reasonable time. *Schoafer vs. Smith*, 43.

2. Want of jurisdiction may be set up in a certiorari to an alias execution to defeat a judgment entered by a justice nine months previously. *Torbart vs. Yocum*, 294.

[*Original Edition, p. 412.]

CHARTER.

1. Under the act of April 29, 1874, the petition and charter of a proposed corporation must conform, both in principal and form, to the directions and provisions of the act.
2. A charter not approved by reason of negligence in these particulars. *In re Red Men's Relief Association*, 208.
3. It must appear by petition or affidavit that at least three signers of articles of incorporation are citizens of Pennsylvania.
4. The articles must show the place where the business is to be transacted: the location of its office is not sufficient.
5. Notices of application for charter must be published in the *Legal Intelligencer* and two general newspapers.
6. Such notice should specify particularly the time and place of such intended application. *In re Enterprise Association*, 372.

CITY. See **LIABILITY, INJUNCTION.**

CIVIL PROCESS. See **EXEMPTION.**

COAL.

1. The word "coal" in this lease construed to have been used in its mercantile sense and not to include nut coal or slack. *Long & McKenney vs. Wood*, 324.
- *2. The defendant's intestate was the owner of coal land. He and the company entered into a contract for the coal, the company agreeing to pay therefor, "the sum of ten cents for each ton (of 2,240 lbs.) of screened coal mined and removed from said land." Two screens were erected, one for "lump coal," and another for "nut coal," and both parties assented thereto, and the coal was shipped to market.
The company resist the payment for "nut" coal, on the ground that only "lump" coal was understood in the contract as coal.
Held, that whatever may be the relative value of the different grades of coal in the market, or the loss or profit on the same, the liability of the company to the defendant for the coal taken cannot be affected by it. *Mercer Mining Co. vs. McKee*, 350.

COLLATERAL. See **BONDS.**

COMMISSIONER.

1. The system for the election of county commissioners provided in the new constitution does not go into operation until the general election in November, 1875.
2. Where the three years' term of an incumbent county commissioner would expire January, 1875, the election of his successor at the general election in November, 1874, to serve until January, 1876, was authorized and valid under the provisions of the act of April 15, 1834, (P. L. p. 540,) and the new constitution. *Commonwealth vs. Stuckrath*, 338.
See **COMMON PLEAS.**

COMMON COUNTS. See **LACHES.**

COMMON PLEAS.

1. The Court of Common Pleas has no power to reform, remodel, or alter an award of arbitrators which has become an absolute judgment of record. *Graham vs. Walker et al.*, 51.
2. The jurisdiction of the Common Pleas of actions of trover and trespass is not taken away, qualified, or restricted by the act of 1814, which gives to justices of the peace jurisdiction of such actions.
3. The act of 1814, giving to justices of the peace jurisdiction of trover and trespass, contains no restriction like the 26th section of the justices' act of 1810, imposing costs on a plaintiff who sues in the Common Pleas on a demand for less than \$100. It is not required in actions of trover or trespass in the Common Pleas that the plaintiff, in order to recover costs, file an affidavit that his demand or claim exceeds \$100.
4. Plaintiff in such actions brought in the Common Pleas, even though he recover less than \$100, is entitled to have judgment entered with costs. *Devers vs. Getting*, 60.
5. Courts are not required to refrain from expressions of opinion upon subjects of contest before it, nor is it error when a court clearly puts the case to the jury on its true question. *Greenough vs. Fulton Coal Co.*, 61.

[*Original Edition, p. 413.]

COMMON PLEAS. (*Continued.*)

6. The refusal of the court to enter non-suit is discretionary and not reviewable. *Steigerwall vs. O'Brian*, 260.

7. Before the Court of Common Pleas can entertain an appeal for an increased assessment, there must be an appeal to the board of commissioners and a final decision by it. *Yuengling vs. Commissioners*, 355.

8. The court cannot pronounce a tax unconstitutional on the mere ground of injustice and inequality. *Commonwealth vs. Thompson*, 361.

See JUDGMENT.

CONCURRENT JURISDICTION. See ORPHANS' COURT.**CONDITION.** See SURETY.**CONSIDERATION.**

A contract was entered into between K. and N. for building a house for a certain sum, and whilst it was in course of erection, it was blown down. K. then promised N. that if he would rebuild the house and complete it, he should be paid \$300 additional. *Held*, that the contract was without consideration, and he could not recover the \$300. *Mayor & Morgan vs. Kirby*, 305.

CONSIGNEE.

1. If a consignee who furnishes such a car, pays to a connecting road the back charges of the company thus restricted, in order to get possession of his goods, which charges so paid are largely in excess of the toll authorized, such a payment is a payment to the company restricted, and enures to the benefit of the consignee, the same as though it was paid directly to the original company.

*2. A voluntary payment, although it be unauthorized, cannot be received back, but where a consignee, in order to secure his goods, of which he has need, and which, if not taken by him, are exposed to risk of fire and damages, pays the charges of the party having the goods in possession, such a payment is not voluntary, and if illegal, can be recovered back. *Root & Rust vs. Railroad Co.*, 134.

CONSTABLE.

If a justice issue an execution, although there has been an appeal, *the constable* cannot be held liable for proceeding with the execution. *Leonard vs. Davis et al.*, 132.

CONSTITUTION.

1. In construing the constitution, a comprehensive view of the whole instrument must be taken. Every part of it must be considered, and all its parts made to harmonize, if practicable.

2. The ninth section of the judiciary article of the new constitution, construed in connection with the fifth section of the same article, and the sixteenth and twenty-sixth sections of the schedule, does not presently constitute the judges learned in the law sole judges of the Courts of Oyer and Terminer, Quarter Sessions and Orphans' Courts. *In re Jurisdiction of Associate Judges*, 25.

3. The new constitution does not affect the taking of land under a special act passed before its adoption. *Wister vs. City*, 66.

4. The act of April 14, 1851, authorizing judgments to be taken in certain cases where no affidavit of defence is filed, in Schuylkill county, is not annulled or repealed by section twenty-six of article V. of the new constitution.

5. Where it was intended by the constitution to annul or abrogate any existing law, the intention is expressed in unambiguous language. *Bright & Co. vs. Mining Co.*, 90.

See COMMISSIONERS.

CONTRACT.

1. A contract for the sale of oil to be called for any time from date to December 31, gives buyer the option to call for it on that day. *Petroleum Co. vs. Cunningham*, 56.

2. A purchaser, if he so chooses, is entitled to have the contract specifically performed, so far as the vendor can perform it, and to have an abatement out of the purchase-money for any deficiency in the title. But specific performance will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance so far as to bar her dower, unless the vendee is willing to pay the full purchase-money and accept the deed of the vendor without the wife joining therein. *Saller vs. Reisz*, Sharswood, J., Legal Chron., vol. 1, page 167, followed *Burke's Appeal*, 116.

3. A contract by which A agreed to execute a good and sufficient deed of a lot

[* *Original Edition*, p. 414.]

CONTRACT—(Continued).

of ground to B upon the payment of fifty dollars, the erection of a building, and its operation as a foundry by the latter, will be enforced, notwithstanding the business of a foundry was afterwards changed. *Plymouth Co's. Appeal*, 130.

4. It is permissible to give evidence of a verbal promise made by one of the parties at the time of making of a written contract, where such promise was used as an inducement to obtain the execution thereof. *Powellton Coal Co. vs. McShane*, 164.

5. The contracts of an infant at common law cannot be enforced except for necessities. When the infant represents himself of age, and thus obtains the credit, he becomes liable in an action on the case for damages. *Hughes vs. Gallans*, 229.

6. Claims for services as a nurse of a decedent will not be allowed when there is no evidence of a contract, but it appears that the service rendered was a matter of pure charity on the part of the claimant. *Abercrombie's Estate*, 333.

See EVIDENCE, CONSIDERATION, INSURANCE.

CONTRACTOR.

If an owner interferes with a contractor and subjects him to his command, the contractor is not liable for injuries to his work occasioned thereby. *Rohrman vs. Steese*, 102.

CONTRIBUTING MEMBER. See CORPORATION.**CORPORATION.**

1. An injunction will not be continued against a corporation merely because a dispute has arisen as to the election of directors who have not yet even taken their seats. *Paynter et al. vs. Clegg et al.*, 4.

2. Creditors cannot inquire into the good faith of a transaction by the company, unless it covers a fraud intended to affect them.

3. An act of an officer of a corporation, afterwards ratified by the board of directors, becomes, by such ratification, the authorized act of the corporation. *Rice vs. Railroad Co.*, 17.

*4. An action of trespass may be maintained if a corporation takes land for public use before entering a bond for compensation. *Dimmick vs. Broadhead*, 126.

5. A contributing member of an engine company, declared not to have such a legal status, under the law creating the corporation as would enable him to invoke the action of a court to reinstate him as a member. *Fire Co. vs. Commonwealth*, 184.

6. Under the act of April 29, 1874, the petition and charter of a proposed corporation must conform, both in principle and form, to the directions and provisions of the act. *In re Red Men's Relief Association*, 208.

7. *Quare.* Whether a foreign corporation located in another State is subject to an attachment execution? *McHugh vs. Bashore et al.*, 220.

See RAILROAD, WRIT.

COSTS.

1. The draft required to be filed upon presentation of petition, asking for the appointment of viewers to assess damages occasioned by the running of a railroad, is within the costs and expenses to be paid by the railroad company, especially when the filing of the same is requested by the company. *Seiber vs. Railroad Co.*, 59.

2. Under the act of March 31, 1860, there must be a trial of the case on its merits, to justify a finding as to who shall pay the costs; a mere formal verdict is not sufficient to impose the costs on the county. *Commonwealth vs. McCuen et al.*, 241.

See JUDGMENT.

COUNSEL FEE. See GARNISHEE.**CREDITORS.**

1. Creditors cannot inquire into the good faith of a transaction by the company, unless it covers a fraud intended to affect them. *Rice vs. Railroad Co.*, 17.

2. If the purchaser is a creditor of the firm, he has no right of set-off at such receiver's sale. *Singerty vs. Fox*, 50.

3. A wife may purchase property on the credit of her separate estate, and hold it against the creditors of her husband. *Seeds vs. Kahler*, 234.

[*Original Edition, p. 415.]

CRIMINAL LAW.

1. The court below refused to permit the grand jurors to be polled on their *voir dire* before the submission of the bill of indictment. *Held*, not to be error.

2. When two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or *res gesta*, the death of one and surrounding circumstances may be given in evidence upon the trial of the prisoner for the murder of the other, not as an independent crime, but as tending to show that the motive was one and the same which led to the murder of both at the same time. *Shafner vs. Commonwealth* distinguished. *Brown vs. Commonwealth*, 180.

3. On a question of the admissibility of the confessions of a prisoner, which had in the first instance been admitted by the court, it is not error to submit it to the jury on the evidence to say whether any improper influence was used, and, in charging, if there was any, that they should disregard the confession. *Brown vs. Commonwealth*, 180.

See EVIDENCE.

DAMAGES.

1. Treble damages may be recovered for cutting timber on the land of another. It is not absolutely necessary to prove that the defendant knew that the timber was not on his land. *Watson vs. Kynd et al.*, 173.

2. The question of damages for personal injuries, resulting from the negligence of railroad employés, is for the jury to determine. *Railroad Co. vs. Dale*, 177.

3. A bond of \$2,000 conditioned that Dr. B. shall not practise medicine in a certain locality, is not to be considered as liquidated damages. *Bigony vs. Tyson*, 212.

4. The measure of damages for ouster is the marketable value of the lease at the time of the ouster. *Long & McKinney vs. Wood*, 324.

5. In determining the damages of a property owner, whose land is appropriated by a railroad company for its road, evidence of the elements of computation of *disadvantages*, the manner the road cuts through the tract, the fields it spoils, the fencing rendered necessary, ditching, embankments, etc., is admissible to enable the viewers or the jury to reach a just conclusion upon the whole matter. *Railroad Co. vs. Gerhart*, 360.

See LIABILITY, STRAY CATTLE.

DEBT.

1. Where a debt against a county for money had and received is presently payable on demand, and the party entitled to receive the money neglects for more than six years to make demand, and there was no reason for the delay, the statute of limitations is a bar to the recovery of such a debt. *School District vs. Columbia County*, 30.

2. The statute of limitations never extinguishes a debt, it only forms a bar to the remedy to recover it by action. *Morris et al. vs. Hannick*, 187.

See MARRIED WOMAN ASSIGNMENT, JUDGMENT NOTE.

DECEDENTS' ESTATES.

1. The decedent executed an assignment, sealed it up in an envelope, and placed it in the fire-proof of the firm, of which he was a member. Upon the outside of the envelope he wrote the name of the assignee, adding, "Please send this to him on my death." After his death it was found in the fire-proof. *Held*, not to be a gift, or to create a trust in favor of the assignee, as there had been no delivery. *Taylor's Appeal*, 76.

2. A. was surety on a lease renewable from year to year, and having given six months' notice that he would not continue surety after the end of the current year, *held*, that he having died in the meantime, his estate was not liable for any rent in arrear after that date. *Desilver's Estate*, 95.

3. A testator having by his will limited the amount to be paid his daughter during her minority, and directed the accumulation to be incorporated into and form part of the body of the estate, *held*, on application of the minor's guardian for an additional allowance, that the direction to accumulate was void under the act of April 18, 1853. *Insurance Co's. Appeal*, 87.

4. The words "leaving no issue," coupled with the words "in case of the decease of either of them," would primarily be construed to mean not death at an indefinite time, but this rule may be made to bend before the intent of the testator. *Shiver's Estate*, 146.

5. A clause in testatrix's will empowered the executrix to sell the real estate, "if,

[*Original Edition, p. 416.]

DECEDENTS' ESTATES—(Continued).

in her opinion, she should think it best," and directed the balance of the purchase money, after the payment of a certain debt, to be put out at interest well secured. It further provided for a certain distribution of the balance of the estate at the death of the two daughters, E. and A., and appointed the daughter E. executrix.

E. died without having sold the real estate, and A. became administratrix *c. t. a.*, and petitioned the court for an order to sell the real estate, which petition set forth no other ground than that the petitioner thought "it best and most advisable to make sale of the real estate without further delay." The order was granted, the report of sale confirmed *viset*, and exceptions filed. After argument, the sale was set aside, and it was held that the fund arising from such sale would not be in condition to be administered and distributed, but a testamentary trust would be constituted, which cannot be committed to an administrator *c. t. a.* *Kline's Estate*, 127.

6. Where a testator devised real estate to his widow for life, directing it to be sold on her death and the proceeds to be distributed, and the widow declined to take under the will, petitioning for partition and valuation under act of April 20, 1869 (Brightley, 530), held, 1st, that the court had jurisdiction in such a case; 2d, that the sale could take place immediately without awaiting her death; 3d, that the legatees cannot take at their valuation unless all are agreed. *Gallagher's Estate*, 144.

7. Claims for services as a nurse of a decedent will not be allowed when there is no evidence of a contract, but it appears that the service rendered was a matter of pure charity on the part of the claimant. *Abercrombie's Estate*, 333.

8. The accumulations directed by this will held to be void, and directed to be given to the minor, as decided in *Pennsylvania Co.'s Appeal*. 31 *Legal Intelligencer*, 69. *Stille's Estate*, 349.

See WILL, LIEN, ASSIGNOR, ADMINISTRATRIX, ORPHANS' COURT.

DEED.

A husband's assent to the execution of a deed by his wife must be in the manner and form required by the statute. *Houck et al. vs. Ritter*, 257.

DEFECTIVE AFFIDAVIT. See page 376.**DEFENCE.**

1. There is no exception to the rule, that in actions real a defence which arises during the pendency of the suit may be pleaded in bar of the plaintiff's rights.

2. Upon a trial in the Common Pleas in a proceeding which originated before two justices of the peace by a landlord to obtain possession of demised premises, it is competent for the defendant to set up as a defence that the title of the landlord had been divested during the term, and that he had the right from the owner, whose title had accrued pending the suit, to remain in possession. *Hackley vs. Walsh et ux.*, 198.

See PROMISSORY NOTE.

***DEMURRER.**

To plead and demur to the same matter is not allowable. After pleading, a defect in the declaration may be taken advantage of by motion in arrest of judgment, or the defendant may be allowed to withdraw his plea, and then demur. *Commonwealth vs. Housekeeper*, 267.

DEPOSITIONS.

When they may be sent out with juries.

See EVIDENCE.

DESCRIPTION.

Under the act of February 17, 1858, a leasehold interest in real estate is made the subject of a mechanics' lien for "all improvements, engines, pumps, machinery, screens and fixtures put up by the tenants;" but this does not apply to every kind of leasehold. A dwelling-house is not included. A description of a house and lot, as "situate on the west side of the railroad and road leading from Pottsville to St. Clair, in said county," decided to be too vague and loose. *Knecht vs. Heintze & Hanley*, 353.

DESIGNATION. See MUNICIPAL CLAIM.**DISTRIBUTION.**

1. A master cannot go behind the decree of foreclosure in distributing a fund raised by the sale. He must distribute it to the parties entitled under the decree. *Rice vs. Railroad Co.*, 17.

[*Original Edition, p. 417.]

DISTRIBUTION—(Continued).

2. The principal sum of \$120,000 is not too large an amount to be withheld from distribution upon the audit of an administrator's account for the purpose of meeting an annual payment of \$6,000. *Grigg's Estate*, 342.

DRAFT. See COSTS.

DRUNKARD, HABITUAL.

1. It is sufficient for a jury to find the party to be an habitual drunkard; the legal consequences flow from that fact.

2. The inquisition stands until overthrown by the evidence of the traverser. *McGuinness vs. Commonwealth*, 40.

DUTIES OF AN ATTORNEY. See ATTORNEYS' DUTIES.

EJECTMENT. See INJUNCTION.

ELECTION, CONTESTED.

1. A contest involving the election of different persons to different offices cannot be raised by a single petition. There must be separate petitions for each office that may be contested.

2. An election held at the proper time and place, and by the regularly chosen officers, will not be set aside, although fraudulent votes may have been received. The remedy in such case is to purge the polls by striking out the fraudulent votes, if possible. *Cass Township Election Case*, 283.

ELECTION OF DIRECTORS. See INJUNCTION.

EMPLOYÉS. See DAMAGES.

EMPLOYER. See ASSIGNMENT.

ENDORSER. See PROMISSORY NOTE.

ENTRY BY GRANTOR.

An entry by the grantor is not required in Pennsylvania to complete the forfeiture. *Brown vs. Bennett*, 132.

EQUITY. See LANDLORD AND TENANT.

EVIDENCE.

1. By virtue of the act of April 12, 1842, commissioners' books are evidence of assessment without other evidence of action on the part of township assessors. *Greenough vs. Fulton Coal Co.*, 61.

2. The general rule in Pennsylvania is that all papers given in evidence in the trial of the cause, except depositions, are to be sent out with the jury.

3. A certified record of bankruptcy offered in evidence during the trial, through which the plaintiff claims the land, may be sent out with the jury, even though there are depositions attached to the proceedings relative to the bankruptcy, but immaterial to the controversy. Such depositions stand on a different footing from ordinary depositions, for the record cannot be cut up and mutilated.

4. It is the duty of counsel to object to papers before they are admitted to the jury-room. *Shomo vs. Zeigler*, 111.

*5. Evidence of the quality of an article should not be admitted unless there is fraud or warranty by the seller. *Whitaker et al. vs. Eastwick et al.*, 154.

6. It was error in the court below in not submitting to the jury evidence offered to show the terms of the acceptance of an offer to sell real estate. *Cleendon vs. Pincoast*, 176.

7. A photograph proved to have been taken from life and to resemble the person photographed, may be used upon a trial for murder to identify him, though, like all other evidences of identity, it is open to disproof or doubt, and must be determined by the jury. *Uddersook vs. Commonwealth*, 200.

8. The evidence must be clear, uncontradictory and distinct to establish a custom or usage in a particular port warranting the captain of a steamboat, under the direction of a part owner, to bind the owners of vessels navigating the Ohio and its tributaries, for the amount of a premium note for the insurance of the boat, executed by the captain. *Adams vs. Insurance Co.*, 262.

9. The rules of evidence are the same in civil and criminal cases when they pertain to questions which must be the same in their nature. *Brown vs. Schock*, 367.

See DAMAGES, CRIMINAL LAW.

[*Original Edition, p. 418.]

EXCAVATION. See **ADJOINING LAND.**

EXEMPTION.

Held, that the co-defendants, whose interests were sold, were not within the provisions of the act of April 18, 1861, which exempted soldiers from civil process, and they can take no benefit or advantage from the provision. *Sheets vs. Huber*, 8.

See **ASSIGNOR.**

EXECUTION.

Execution was issued upon a joint judgment against several co-defendants, one of whom was in the service of the United States as a soldier at the time. Upon application the court stayed the writ as to the soldier and a sale of the other defendants' interest was had, and the deed acknowledged. *Held*,

1. That the purchaser took a valid title.

2. If an execution was forbidden and void as against one defendant, it does not follow that it was illegally issued against a co-defendant. *Cadmus vs. Jackson*, 2 P. F. Smith, 295, *distinguished*.

3. The principle that "process forbidden by law is void, and a sale under it conveys no title," has no application in this case.

A writ of execution, although irregular and erroneous, is not necessarily a nullity. The validity of the judgment upon which such executions issued cannot be questioned in a collateral action, or other manner than by suing out a writ of error or by direct application to the court in which it is entered or from which execution issued to vacate or set it aside. *Sheets et al. vs. Huber et al.*, 9.

4. *Quare*. Whether a foreign corporation located in another State is subject to an attachment execution? *McHugh vs. Bashore*, 220.

See **CONSTABLE, STAY OF EXECUTION.**

EXECUTOR. See **DECEDENTS' ESTATE, WILL.**

EXPRESS ASSENT. See **SURETY.**

EXTERIOR NEWNESS.

1. Newness of structure in the *exterior* is necessary to give notice to purchasers and lien creditors.

2. Whether the erection be new or old is sometimes difficult to decide, and then it is a mixed question of law and fact, and in contested and disputed cases it is a question for the jury. *Steigercwalt vs. O'Brian*, 260.

FEME COVERT.

A *feme covert* may become a party to a parol partition held by her with others as tenants in common. *Ernst et al. vs. Zerbe*, 119.

FENCES.

Until a person encloses his land, or part of it, he cannot legally be called upon to pay any part of the expenses of building fences by persons adjoining his land on either side. *Loeb vs. Nissley*, 149.

See **ADJOINING OWNER.**

FIELD NOTES.

The admission of copies of field notes of a person who was not even the deputy surveyor cannot be admitted. *Rodgers vs. Railroad Co.*, 240.

FI. FA.

Where the funds arising from a sheriff's sale are insufficient to pay liens prior to a judgment, it is error to apply any of the fund in payment of the costs on such judgment arising prior to the issuing of the *fi. fu.* *Fry's Appeal*, 230.

See **MECHANICS' LIEN.**

* **FISHING.** See **NAVIGATION.**

FORECLOSURE.

A master cannot go behind the decree of foreclosure in distributing a fund raised by the sale. He must distribute it to the parties entitled under the decree. *Rice vs. Railroad Co.*, 17.

FOREIGN ATTACHMENT.

Where the testimony produced in the depositions taken in a proceeding to dissolve a foreign attachment appears to establish the fact that the defendant was a resident of this commonwealth at the time the attachment issued, the attachment will be dissolved. *Raub vs. Eakin*, 22.

FRAUD. See **LANDLORD AND TENANT.**

FRAUDULENT VOTES, ETC. See **ELECTION, CONTESTED.**

FREIGHT. See **RAILROAD.**

GARNISHEE.

No order for the allowance of a counsel fee and costs to a garnishee will be made where the record shows no appearance of counsel, no interrogatories filed, nor answers prepared on the part of the garnishee. *Raub vs. Eakin*, 22.

See **ISSUE STATUTORY PERIOD, BROKERS, JUDGMENT.**

GOODWILL. See **BONDS.**

GUARANTEE.

1. A license to take away soil, sand, etc., and the guarantee having expended money on the faith of it, cannot be revoked. *Davis vs. Souder*, 55.

2. Where there is a written guarantee of the successful operation of the new machinery, the purchaser may try for a reasonable time before returning it to the vendor. *Providence Co. vs. Iron Co.*, 244.

GUARDIAN.

A guardian of the person of an illegitimate child is entitled to its custody in preference to its putative father. *Walcisa vs. Walcisa*, 281.

HEIRS AT LAW. See **WILL.**

HUSBAND AND WIFE.

1. The husband is liable for necessities furnished to the wife for the support of herself and family, although she has been decreed a *feme sole trader*. *Markley vs. Wartman et ux.*, 168.

2. A married woman cannot be convicted for selling liquor without license where the same is done in the presence of her husband.

3. The husband would be coercively present if in the house, though not in the room where the selling was going on. *Commonwealth vs. Lindsey*, 216.

4. A wife may purchase property on the credit of her separate estate and hold it against the creditors of her husband. *Seeds vs. Kahler*, 234.

See **DEED.**

IDENTITY.

In this case the question of identity was properly submitted to the jury. *Brown vs. Schock*, 367.

See **EVIDENCE.**

ILLEGITIMATE CHILD. See **GUARDIAN.**

IMPRISONMENT FOR DEBT. See **BAIL.**

INCORPORATED TOWN. See **TRADE-MARK.**

INDICTMENT. See **WITNESS.**

INFANT. See **CONTRACT.**

INJUNCTION.

1. An injunction will not be continued against a corporation merely because a dispute has arisen as to the election of directors who have not yet even taken their seats. *Paynter et al. vs. Clegg et al.*, 4.

2. A creditor who denies in his answer a married woman's title to real estate, and alleges that the property belongs to her husband, will not be enjoined from levying on it and selling it as the husband's property. Under such circumstances a court of equity will not investigate the title, but leave the parties to contest it at law. *Dyer vs. Bank*, 36.

*3. A plaintiff will not be restrained from selling an alleged interest in real estate of his judgment debtor, unless the want of such interest is clear and manifest. The determination of title will be left to an ejectment.

4. In this case the invalidity of plaintiff's lien by reason of defendant's adjudicated bankruptcy was not sufficiently clear to justify an order restraining execution. *Reeser vs. Johnson*, 225.

5. The act of April 8, 1846, prohibiting courts of equity from issuing injunctions against the erection or use of public works, is by its terms limited to courts within the city and county of Philadelphia, nor would the act be of binding force

[*Original Edition, p. 420.]

INJUNCTION—(Continued).

where an injunction is the only peaceable method of preventing a violation of the constitution. *Hecksher & Co. vs. Water Co.*, 252.

6. When tenants operating under a lease to mine coal have worked over their boundary line into adjoining land leased to other tenants, and this clearly is established or conceded, a court of equity will enjoin against any further working.

Where, however, the line is in dispute, an injunction will not be granted until the rights of the respective parties are settled at law or in equity. *Alter, Focht et al. vs. Bowman*, 298.

7. Mandamus will not lie where there is an adequate remedy at law.

8. The court will not restrain by mandamus an alleged illegal increase of assessment of property for taxable purposes, the act of assembly of 10th May, 1871, providing a full and adequate remedy by appeal. *Yuengling vs. Commissioners*, 355.

9. The appropriate functions of a mandamus are the enforcement of duties to the public by officers and others, who either neglect or refuse to perform them. *Commonwealth vs. Thompson*, 361.

See **TAXES**.

INQUISITION.

1. The holding of an inquisition, under the 44th section of the act of the 16th June, 1836, is a judicial act, and must be performed by the sheriff himself. If held by a deputy it is invalid, though it may bind the sheriff. *Klopp vs. Breitenbach*, 67.

2. When an inquisition has been held and the defendant's land condemned, a judgment creditor who has levied upon the same land under a *f. fa.* may issue his *ven. exp.* and sell without another inquisition. *McCullough & Co. vs. Thornton*, 321.

See **HABITUAL DRUNKARD**.

INSTITUTION.

Where the intent is clear, a devise to an institution under a wrong or abbreviated name is good. *Kimmel et al. vs. Wagner et al.*, 106.

INSURANCE.

1. The secretary of an insurance company is the organ of communication with policy-holders, and has authority to inform a holder of the cancellation of his policy; on such cancellation there can be no recovery of assessment on premium rate. The language of the secretary in this case construed to be a notification of cancellation. *Columbia Insurance Co. vs. Masonheimer*, 223.

2. Where a policy issued by a mutual insurance company provides that if an assessment on the premium note be not paid within thirty days after notice and demand the policy shall be null and void until said assessment be paid. Held, that the words "null and void" did not work an extinguishment of the contract, but merely a suspension of the policy until the default was ended, and that the assured was liable for an assessment made on his premium note during such suspension of his policy.

Where a premium note is made payable in such sums and at such times as the directors may, agreeably to their act of incorporation, require, an assessment made by the directors in pursuance of the act is conclusive on the assured, and he will not be relieved from the payment of such assessment, or any part thereof, unless he can show fraud or gross mistake on the part of the directors in making it. *Hummel vs. Insurance Co.*, 336.

See **EVIDENCE**.

INTERPLEADER.

A peremptory nonsuit on a sheriff's interpleader is such a determination of the issue as will operate to forfeit the bond if the goods are not forthcoming. *O'Neill et al. vs. Wilt*, 72.

An actual levy upon the goods which are the subject-matter of the adverse claim is not necessary to a sheriff's interpleader. *Philips vs. Reagan*, 84.

IRREGULAR ENDORSEMENT.

An irregular endorsement of a note should put a purchaser on inquiry, and affects him with notice of the equities of the parties. *Loose vs. Bissell*, 362.

[Original Edition, p. 420.]

◆ISSUE.

1. Under section 41, act of 15th of March, 1832, an issue *devisavit vel non* is of right whenever a dispute upon a matter of fact arises before the register's court.

2. But the fact must be material to the subject of controversy, a substantial matter of dispute, necessary to be determined before a decision can be reached. *DeHaven's Appeal*, 123.

It is the duty of any person desiring an issue to reduce his request to writing, and to present the same under oath to the auditor. *Morgan's Estate*, 194.

JUDGES.

Associate judges in commission on the first day of January, 1874, continue to hold their respective offices, and it is their right and duty to serve in all the courts as *heretofore*, until the expiration of the terms for which they were elected and commissioned. *In re Jurisdiction of Associate Judges*, 25.

A judge may, where the evidence is uncontradicted, tell the jury that it is their duty to convict. *Commonwealth vs. Mugee*, 42.

JUDGMENT.

1. If a vendee fails to pay the amount due and surrenders back the possession of the property, he cannot be compelled to satisfy a judgment which was to have been a part payment for the property. *Arnold's Administrators vs. Fitzgerald*, 87.

2. Where judgment has been entered by a justice against a defendant who was in default, but who, within twenty days, entered bail for an appeal which he neglected to bring into court, certiorari will not avail to set aside an execution subsequently issued, even though the service of the summons be shown by the record to have been defective. Taking the appeal amounts to a recognition that the case was regularly before the justice, and is a waiver of the defect which otherwise would have been fatal. *Jones vs. Delaware and Hudson Canal Co.*, 159.

3. The act of February 24, 1806, authorizing judgments to be entered by the prothonotary on notes and other instruments, with confession of judgment attached, gives an additional remedy for collections, to which the statute of limitations does not apply.

4. Where a debt, even though it be "grounded upon any lending or contract, without specialty," is acknowledged by a debtor under the form of a note, with confession of judgment attached, it may be entered in judgment and collected, notwithstanding more than six years have intervened between the maturity of the note and the entry of judgment upon it. *Morris vs. Hannick*, 187.

5. The court in this and similar cases have the right to strike off judgment. *Lutes vs. Thompson*, 58.

6. Judgment was properly entered against a garnishee where the record showed that there was no service on the defendant, who resided out of the county, and that more than five years had elapsed since the rendition of the original judgment, without revival. *Brock, Emery & Co. vs. Driebelbies*, 292.

7. Plaintiff in such actions brought in the Common Pleas, even though he recover less than \$100, is entitled to have judgment entered with costs. *Devers vs. Gething*, 60.

See AUDITOR, CONSTITUTION, FI. FA., LACHES, SURETY.

JUDGMENT BY DEFAULT.

1. There is nothing in the statute authorizing a justice of the peace to enter judgment by default against the defendant upon the mere statement of the amount and the examination of it. If the plaintiff does not appear before the justice in person, he must be represented by an agent or by witnesses. *Tyler vs. Anthony*, 15.

2. A judgment by default on an appealed case not taken in accordance with the rule in such cases is of no validity and will be set aside. *Wm. Saylor vs. R. R. Morris*, 215.

See AFFIDAVIT and page 294.

JUDGMENT NOTE.

1. The giving of a judgment note by a minor is void.

2. That the retaining of the property, for which the judgment note was given, after the minor became of age, does not ratify the contract and make the note valid. *Lutes vs. Thompson*, 58.

[*Original Edition, p. 421.]

JUDGMENT NOTE—(Continued).

3. A judgment note dated more than four months prior to the adjudication of bankruptcy, but entered and execution issued thereon within that time, is not *ipso facto* fraudulent.

4. It requires something more than mere passive non-resistance to invalidate a judgment and levy when the debt is really due and defendant has no defence. *Sleek et al. vs. Turner's Assignee*, 235.

JURISDICTION.

1. Associate judges in commission on the first day of January, 1874, continue to hold their respective offices, and it is their right and duty to serve in all the courts as *heretofore*, until the expiration of the terms for which they were elected and commissioned. *In re Jurisdiction of Associate Judges*, 25.

*2. The jurisdiction of the Common Pleas of actions of trover and trespass is not taken away, qualified, or restricted by the act of 1814, which gives to justices of the peace jurisdiction of such actions.

3. The act of 1814, giving to justices of the peace jurisdiction of trover and trespass, contains no restriction like the 26th section of the justices' act of 1810, imposing costs on a plaintiff who sues in the Common Pleas on a demand for less than \$100. It is not required in actions of trover or trespass in the Common Pleas that the plaintiff, in order to recover costs, file an affidavit that his demand or claim exceeds \$100. *Devers vs. Gething*, 60.

4. The jurisdiction of the magistrate should be affirmatively shown by the record in a proceeding to obtain possession of the premises for non-payment of rent. *Trimboth et ux. vs. Patterson et al.*, 226.

5. Where the jurisdiction of a justice is attacked, evidence may be given *aliunde* to determine the jurisdiction.

6. A party cannot remit part of a claim to confer jurisdiction on a justice.

7. Want of jurisdiction may be set up in a certiorari on an alias execution to defeat a judgment entered by a justice nine months previously. *Torbert vs. Yocum*, 294.

See DECEDENTS' ESTATES.

JURY.

1. It is sufficient for a jury to find the party to be an habitual drunkard, the legal consequences flow from that fact. *McGuinness vs. Commonwealth*, 40.

2. A verdict of a jury will not be set aside for the misconduct of a juror in conversing about the cause on trial with a witness before or during the trial, when no improper influence or bias is shown, unless such misconduct was caused by a party to the suit, or his agent, or by his representations, and proof of the bias must be clear and manifest. *Shomo vs. Zeigler*, 111.

3. The sheriff's return of jurors summoned did not name them, but the alderman's record did. *Held*, The variance immaterial in the absence of objection or challenge at the time, as they must be presumed to be the same persons. *Gavit vs. Hall*, 170.

4. Whether the erection be new or old is sometimes difficult to decide, and then it is a mixed question of law and fact, and in contested and disputed cases it is a question for the jury. *Steigerwalt vs. O'Brian*, 260.

See IDENTITY, LACHES, DAMAGES.

JUSTICE OF THE PEACE.

1. Proceedings in an action before a justice of the peace will be set aside when it appears there had been a continuance without day, and afterwards the justice proceeded to hear and pass judgment in the cause without notice to the defendant. *Brown vs. Hambricht*, 35.

2. A justice has jurisdiction where the plaintiff's claim, however large, is reduced to or below one hundred dollars by direct payments, or by dealing, amounting to and admitted as payments. *Bacr vs. Garrett*, 183.

3. The record of a justice of the peace should show affirmatively everything necessary to give him jurisdiction. *Yeich vs. Peterson & Carpenter*, 249.

4. A summary conviction by a justice of the peace, the record of which is not in conformity with the act of assembly in such case made and provided, will be reversed. *Commonwealth vs. Camory*, 296.

See JURISDICTION, JUDGMENT BY DEFAULT.

[*Original Edition, p. 422.]

LACHES.

1. A certiorari must be applied for within a reasonable time. Laches of the defendant will deprive him of the benefit of any exception to the proceedings had before a justice of the peace. *Schaefer vs. Smith*, 48.

2. The city of Philadelphia is not responsible for the negligence of its police-officers while engaged in the enforcement of a city ordinance. *Elliott vs. City*, 105.

3. As a general rule, a question of negligence must be submitted to a jury. Where the measure of duty is ordinary and reasonable care, it is always a question for the jury. There is no absolute rule as to what constitutes negligence.

4. Where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Where negligence is concurrent a child will not be held to the exercise of the same degree of care and discretion as an adult. *Crispy vs. Railroad Co.*, 75.

5. In an action against a railroad company for killing a child two years and two months old, the question as to the position of the child, whether the engineer could see it, and the rate of speed of the train, were properly left to the jury.

*6. The court below charged that the fact that the child was found in the street affords strong presumption of negligence; but the jury were to consider whether the mother took reasonable care of the child; if she did not it was negligence. *Held*, correct. *Railroad Co. vs. Long*, 78.

7. The opening of a judgment regularly obtained is *ex gratia*. It will be refused where the defendant is guilty of laches, and especially where he tenders no affidavit explaining his laches and showing a defence. *Swain vs. Halberstadt & Wilson*, 160.

8. Under counts for goods sold and delivered, work and labor done, the common money counts, and on an account stated, there can be no recovery against a bailee for negligence in not returning the full amount of goods bailed. *Satterlee vs. Melich*, 172.

See DAMAGES, LIABILITY.

LAND. See MARRIED WOMAN.

LANDLORD AND TENANT.

1. M. sold and conveyed certain premises, then under lease to G. and S., to T., and subsequently, for the purpose of delivering possession (as was shown by the record), gave notice to the tenants to quit. *Held*, that the lessor had not parted with her entire interest by such sale, but retained possession, which was sufficient interest to entitle her to give the necessary notice to quit. *Thompson, Assignee, vs. Glenn et al.*, 52.

2. Equity will not restrain a proceeding by landlord against tenant for possession upon grounds, such as change of title, which may be asserted by the tenant in the proceeding itself. *Vanarsdalen vs. Whitaker*, 190.

3. Where a lease contains a covenant that if the rent is not paid at a specified time it shall work a forfeiture of the lease, and the landlord may forthwith enter and take possession, the non-payment of the rent does not make the lease absolutely null and void, but only voidable at the election of the landlord.

4. When a landlord, with knowledge of the forfeiture, receives rent falling due after that, it is a waiver of the forfeiture; but not so if the rent was due before the forfeiture.

5. Under the terms of such a lease, if a landlord proceeds by a landlord's warrant and collects the rent, it is then too late to declare a forfeiture and take possession. If, however, he declared a forfeiture and took possession before, or simultaneously with, the issue of the warrant, the payment of the rent on the warrant would not restore the right of possession to the lessee.

6. If, through the artifice or trick of the landlord or his agent, to enable him to declare a forfeiture, the lessee was induced not to pay the rent within the specified time, it was bad faith—a fraud—on the part of the landlord, and he had no right to take advantage of the delay to declare a forfeiture for the non-payment of rent due.

7. In an action for breach of covenant for quiet enjoyment the burden of proving a sub-letting on the part of a lessee, in violation of his covenant, rests upon the defendant. The lessee's consent to proceedings upon the part of a third party to procure a right of way through the premises, is not a sub-letting. *Long & McKinney vs. Wood*, 324.

See LIEN, INJUNCTION.

[*Original Edition, p. 423.]

LEASE. See LANDLORD AND TENANT, INJUNCTION.

LEGACY.

A bequest of the interest of a certain mortgage for life is a specific legacy, and if the specific security is lost the legatee takes nothing. *Gallagher's Appeal*, 217

LEGATEE. See LEGACY, DECEDENTS' ESTATES.

LEGISLATURE.

An act of the legislature must violate some prohibition, either expressly or necessarily implied, either of the federal or State constitution, before it can be pronounced by the judicial department unconstitutional and void. The court cannot pronounce a tax unconstitutional on the mere ground of injustice and inequality.

The legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, but the abolition of all remedies by a law operating in *presenti* is the impairing of the obligation of the contract, and therefore unconstitutional. *Commonwealth vs. Thompson*, 361.

LESSEE. See LANDLORD AND TENANT.

LEVY. See INTERPLEADER, LIEN.

LIABILITY.

1. To render the endorser of a note liable, demand must be made of the maker, if at a bank or place of business, within usual business hours; if at his residence, at a reasonable time, and not at an hour when it may be presumed the family will be in bed, unless the maker or his agents are in the office when demand is made, though out of business hours. *Ashton vs. Dull*, 64.

*2. The plaintiffs below, who kept an account with the defendant, made a special deposit of certain bonds for safe keeping, paying nothing for the privilege; the bonds were stolen by the teller, who had always borne a good character.

Held, that the bank was a gratuitous bailee, and as such not liable, except for gross negligence.

3. That neither the fact that the bank might have discovered that the teller was dishonest by a more frequent or accurate examination of his accounts, nor that he was allowed to keep the "individual ledger," which was the only book which was a check upon him, nor that he was not dismissed when it was discovered that he had made a successful speculation in stocks, was such negligence as to render the bank liable.

4. That nothing short of knowledge or reasonable grounds of suspicion by the bank, that the teller was unfit to be appointed or retained, would render it liable. *Foster vs. Essex Bank*, 17 Mass. 478, approved and followed; *Lancaster Bank vs. Smith*, 12 P. F. S. (62 Penna. Stat.) 47, remarked on. *Scott vs. Bank*, 94.

5. The city is liable for the killing of a boy in the building of a bridge, although it was built by contract, where the work is intrinsically dangerous. *Rose vs. City of Philadelphia*, 153.

See CONTRACT, CONTRACTOR, MECHANICS' LIEN, DECEDENTS' ESTATES, PROMISSORY NOTE, ADMINISTRATRIX, MARRIED WOMAN.

LICENSE. See GUARANTEE, HUSBAND AND WIFE.

LIFE ESTATE.

In order to give the defendant the benefit of the provisions of 4th section of act of January 24, 1849, he must have an undoubted life estate in the land levied upon. *DeFrehn vs. Leitenberger*, 335.

LIEN.

1. When a mortgage is prior to all other liens, except a fixed charge on the land not itself divested by the sale, its lien is preserved by the act of 1830, although there may be arrears of the prior charge due and unpaid, whether they accrued due before the date of the mortgage or subsequent to it, and that such arrears, being a part of the fixed charge itself, are therefore not to be paid from the fund in court. *Lensenig et al. vs. Thompson*, 12.

2. A contract to build a vessel is a contract to be performed on land, and falling within the ordinary common law, and belongs to State jurisdiction, and a State has a right to give a lien against her for work and materials entering into her construction. *Schooner Maggie Cuth vs. Shakespeare*, 85.

3. Landlord's lien for one year's rent on goods liable to distress is a prior lien by the act of 1836. *Johnson vs. Williams et al.*, 134.

[*Original Edition, p. 424.]

LIEN—(Continued).

4. Where a property has been levied on, and an inquisition and condemnation turned, the lien of judgment is good against lands of a decedent still in possession of the heirs, although there has been no revival within five years of testator's death. *Shearer vs. Brinley*, 202.

See **MARRIED WOMAN, FI. FA., MECHANICS' LIEN.**

LIQUOR. See HUSBAND AND WIFE.**LIVE STOCK.**

The coaling of locomotives engaged in transporting live stock on Sunday being a work of necessity and charity, is excusable. *Commonwealth vs. Conway*, 303.

LOCOMOTIVES. See LIVE STOCK.**MACHINERY. See GUARANTEE.****MARRIED WOMAN.**

1. Property acquired by a married woman on the credit of her separate estate, and afterwards paid for by profits arising out of it, is not liable for the debts of her husband.

Agnew, C. J., dissents. Purman et al., vs. Porter et ux., 15.

2. A wife gave a mortgage *without joining her husband*, on property which was in her name; judgment was afterwards obtained on the mortgage, and the property was sold by the sheriff on a judgment against the husband and the wife. *Held*, on distribution of the fund, that after payment of prior liens, it should be appropriated to the judgment on the mortgage.

3. The judgment on the mortgage might have been reversed or set aside at the instance of the wife, but until directly avoided by her it cannot be impeached collaterally except for fraud. *Appeal of Butterfield's Executors*, 88.

4. A naked ratification by a married woman after discovery is of no avail, but where there is a consideration and sufficient to support the promise, it is good. *Brown vs. Bennett*, 132.

5. Plaintiff, who inherited certain real estate in 1837 from her father, married before 1848, and in 1852, under the proviso of the 48th section of the act of March 29, 1832, made a declaration authorizing her share of the real estate, which had been partitioned in 1851, to be paid to her husband without security; the husband died in 1871, and plaintiff sued his estate to recover the amount paid him under said declaration. *Held*, that the husband was not a trustee, and the payment of her share in partition was absolute.

*6. The married woman's act (April 11, 1848) did not impair the vested interest of the husband, although partition did not take place until 1851.

7. Where the wife acquires the estate after April 11, 1848, the act of March 29, 1832, section 48, is inoperative. *Kramer's Administrators vs. Kramer*, 110.

8. The bond of a married woman for purchase money, though constituting a lien upon the land purchased, is invalid as a personal obligation, and execution will be restricted to the land sold. *McHugh vs. Bashore*, 220.

See **INJUNCTION, HUSBAND AND WIFE.**

MASTER'S REPORT.

1. A master cannot go behind the decree of foreclosure in distributing a fund raised by the sale. He must distribute it to the parties entitled under the decree.

2. Where there is no residue after the bondholders and lien creditors are satisfied, stockholders have no interests that need consideration.

3. The master should consider and settle the titles of adverse claimants to bonds. *Rice vs. Railroad Co.*, 17.

MECHANICS' LIEN.

1. After pleading payment to a *scire facias* on a mechanic's lien, no question as to the sufficiency of the lien can be raised.

Under the act of February 17, 1858, a lien was filed for a patent hoisting and dumping cage against the entire leasehold estate of the colliery.

Held, that the act of assembly gave the mechanic no such lien. It confines the lien clearly to the interest of the lessees in the improvement and machinery upon which his labor and services were bestowed. *St. Clair Coal Co. vs. Marts*, 83.

[*Original Edition, p. 425.]

MECHANICS' LIEN—(Continued).

2. Where a sheriff makes sale on a *fi. fa.* of leasehold property subject to mechanics' liens, and pays over the money to the *fi. fa.* creditors on the day of sale or at any other time before the return day of the writ, he is liable to mechanics' lien creditors for claims filed after the return day, if in other respects within time. The sheriff is presumed to know the law, and is bound to take notice of such claims from the nature of the property sold, and if he misappropriates the money derived from such sale, he is liable to mechanics' lien creditors. *Bird vs. Shirk*, 147.

3. Mechanics, miners, laborers and others claiming under the act of April 9, 1872, must give notice in writing to the officer executing the process before the actual sale of the property; in default of this notice, no lien. Construction of said act and its requirements. *Bank vs. Childs*, 186.

4. Repairs and additions to a building are not within the purview of the mechanics' lien law. It must be a rebuilding upon another and larger scale. *Steigewalt vs. O'Brian*, 260.

5. The act of April 9, 1872, "for the better protection of the wages of mechanics, miners, laborers and others," does not give a lien for wages earned after the particular property has been seized by the sheriff on an execution. Property levied is in the custody of the law, and when sold the proceeds are preserved against lien creditors subsequent to the delivery.

6. When a mechanics' lien which is defective has been filed, and the property against which it is entered is sold by the sheriff before the expiration of the six months allowed by law for filing the lien of a mechanic, the claim may be made upon the fund with the same effect that it could be made if a lien sufficient in form and substance had been entered of record before the sale. *Schrader vs. Burr*, 263.

7. Under the act of February 17, 1858, a leasehold interest in real estate is made the subject of a mechanics' lien for "all improvements, engines, pumps, machinery, screens and fixtures put up by the tenants," but this does not apply to every kind of leasehold. A dwelling house is not included. *Knecht vs. Heintze and Hanley*, 356.

See LIEN.

MINING COAL. See RAILROADS.

MINOR. See JUDGMENT NOTE.

MISCONDUCT OF A JUROR. See JURY.

MORTGAGE.

1. When a mortgage is prior to all other liens, except a fixed charge on the land not itself divested by the sale, its lien is preserved by the act of 1830, although there may be arrears of the prior charge due and unpaid, whether they accrued due before the date of the mortgage or subsequent to it, and that such arrears being a part of the fixed charge itself, are, therefore not to be paid from the fund in court. *Lensenig vs. Thompson*, 12.

*2 A mortgage made to secure the payment of certain bonds is made for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder. *Rice vs. Railroad Co.*, 17.

See MARRIED WOMAN.

MUNICIPAL CLAIM.

A municipal claim for curbing or paving, filed against the administrator of a decedent, owner or reputed owner, or whoever may be the owner, and describing the lot or lots against which the lien is claimed, is a sufficient designation of the ownership of the premises.

The non-apportionment of such a claim is not ground for striking it from the docket. *Borough of Pottsville vs. Bank*, 348.

NAVIGATION.

The right of fishing in a river is subordinate to that of navigation, but this does not excuse the master of a vessel from running into and damaging a net of a fisherman where he could change the course of the vessel *without prejudice to the reasonable prosecution of his voyage*, and thus avoid the net. *Cobb vs. Bennet*, 81.

NAVIGABLE RIVER.

In Pennsylvania the common law distinction of what constitutes a navigable river is not recognized.

[*Original Edition, p. 426.]

NAVIGABLE RIVER—(Continued).

An owner of land upon a stream that is not navigable has such a property in the stream, that it cannot be taken away from him by act of legislature, unless just compensation be first made or secured, and then only for public uses.

Whether an owner of land upon a navigable stream, has such a right of property in the stream, *dubitar.* *Hecksher vs. Water Co.*, 252.

NEGOTIABLE PAPER.

Bona fide purchasers of negotiable paper for value cannot be effected by private understandings between third parties. *Mishler vs. Reed & Henderson*, 233.

See BONDS.

NON-APPORTIONMENT. See MUNICIPAL CLAIM.

NON-RESIDENT.

To hold non-resident defendants by a service on an alleged agent, the return of the officer must show that he complied with the act by serving the summons at the place, or one or other of the places, mentioned in the act. *Yeich vs. Peterson & Carpenter*, 249.

NOTICE.

A was told in January that B's partnership was for one year. *Held*, that A had such notice of its dissolution as put him on inquiry. *Schlater vs. Winpenny*, 100.

OPENING A JUDGMENT. See LACHES.

ORPHANS' COURT.

The jurisdiction of the Orphans' Court over claims made against a solvent estate by creditors of the decedent is not exclusive, but concurrent with that of the courts of the common law; and where a creditor has elected to sue in another tribunal, and refuses to present his claim against the fund for distribution in the Orphans' Court, the latter will, notwithstanding a legatee's demand for present distribution, direct enough of the fund to be retained by the administrator to meet the exigency of the creditor's suit in another court. *Griggs' Estate*, 342.

PAROL EVIDENCE.

Parol evidence may be properly admitted to prove the number of acres in a farm called in testator's will the McKinstry farm. *Clapsaddle vs. Eberley*, 237.

PARTITION.

1. A *feme covert* may become a party to a parol partition of lands held by her with others as tenants in common.

2. Such a partition, executed by marking the lines of division upon the ground, followed by a corresponding possession in pursuance of the agreement, is good, notwithstanding the statute of frauds.

3. Partition neither enlarges nor diminishes the estate of each tenant in common. It is less than a grant. The act of February 24, 1770, which establishes the only way by which husband and wife may convey the estate of the wife, does not apply to partition. *Enst et al. vs. Zerbe*, 119.

4. The presumption of notice to the widow of partition and sale, from the recital in the order of sale, will be presumed, especially so after the lapse of twenty years. *Vensel et al. vs. Colner*, 258.

See MARRIED WOMAN.

* PARTNERSHIP.

After dissolution of a partnership and payment of its debts, if there is no special agreement, each partner should be repaid ratably his advances. *Christman vs. Baurichter*, 73.

The 21st and 22d sections of limited partnership act of March 21, 1836, apply to existing partnerships only. *Pusey vs. Dusenberry*, 199.

See NOTICE.

PAUPER.

An order of removal of a pauper not appealed from, is final and conclusive as to the settlement of the pauper. *Tioga Co. vs. South Creek Township*, 107.

PETITION. See CHARTER, ELECTION CONTESTED.

[*Original Edition, p. 427.]

PHOTOGRAPH. See EVIDENCE.

PLEA.

A plea filed any time before judgment is in time. *McPhilips vs. Insurance Co.*, 248.

POLICY. See INSURANCE.

POLICY OF LAW.

The phrase, "No interest or policy of law," in the act of 1869, *held*, to mean that which before the passage of that act excluded parties from testifying in their own suits, or where they had any interest in the subject-matter in controversy. *Tioga Co. vs. South Creek Township*, 107.

POLLING GRAND JURY. See CRIMINAL LAW.

POSSESSION.

Possession is title, and the one having such title can only be ousted by him who shows one superior to it.

All the requirements of an act of assembly relative to the sale of lands, not being complied with by the bidder at a public sale, possession cannot be obtained by a person claiming title from the bidder. *Fisher vs. City of Philadelphia*, 156.

See ISSUE, LANDLORD AND TENANT.

PRACTICE.

1. A judge may, where the evidence is uncontradicted, tell the jury that it is their duty to convict. *Commonwealth vs. Magee*, 42.

2. A motion to dissolve an injunction will not be entertained until an answer be filed. *Heyl vs. City*, 67.

3. Statements on information made in an affidavit of defence should be averred, to be believed by defendant. *Cake vs. Stidfolc*, 94.

4. Parol testimony is admissible to establish the existence of a waiver of condemnation, which had been a record and become lost. *Hamberger vs. Brooker et al.*, 96.

5. A direction to the jury to find a verdict "for such damages for the breach of the contract as you may find on the testimony he (the plaintiff) is entitled," is erroneous in leaving the facts and law to them without any instructions to guide them. *Schofield vs. Simpson*, 108.

6. In an indictment where a felony and a misdemeanor are joined, neither the defendant nor his wife is a competent witness under the act of 3d April, 1872. *Commonwealth vs. Ceary*, 145.

7. When money is paid into court by a garnishee in a contest between the attaching creditor and a judgment creditor of the garnishee the issue should be formed between them. *Good vs. Grant et al.*, 175.

See AGENT, ARBITRATOR, AUDITORS, CONTRACT, CRIMINAL LAW, DEMUR-
RER, EVIDENCE, ISSUE, INJUNCTION, JUDGMENT, JURY, LACHES, MARRIED
WOMAN, TAXES.

PREMIUM NOTE. See EVIDENCE, INSURANCE.

PRESUMPTION OF NOTICE.

The presumption of notice to the widow of partition and sale, from the recital in the order of sale, will be presumed, especially so after the lapse of twenty years. *Venael et al. vs. Colner*, 258.

PROCEEDINGS. See JUSTICE OF THE PEACE.

PROCEEDS. See BROKERS.

PROMISSORY NOTE.

1. When a note is taken after its maturity, it is taken subject to the equities existing between the original parties arising out of or connected with the note itself, such as its accommodation character, but not to a set off. *Long vs. Rhawn*, 65.

*2. Where two persons signed a note, and one of them paid his half and received a receipt "in full for his half of the note," this does not release his liability as surety for the remaining half. *Sterling vs. Stewart*, 92.

[* *Original Edition*, p. 428.]

PROMISSORY NOTE—(Continued).

3. Actual notice is all that is required to charge an endorser. *Cake vs. Stidsole*, 94.

4. The maker of a promissory note is by the form and effect of his contract a principal, and cannot reduce his responsibility to the holder to that of a surety by proof that he made the note for the accommodation of another party and that that was well known to the holder at the time he received it.

5. Therefore the maker of a promissory note is not discharged from responsibility to the holder who discounted it for another person, by proof that the holder knew that the maker was an accommodation maker and neglected to issue an execution upon a judgment which he held as a security for the note, when notified to do so by the maker. *Bank vs. Frasier*, 191.

6. In a suit against three drawers of a joint promissory note, where there has been service of the writ upon two only, a copy of the note and a mere statement filed are sufficient to entitle the plaintiff to judgment against those served—under the 5th section of the act of March 21, 1806. *Donoug vs. Boger*, 195.

7. Where suit is brought on a promissory note, an affidavit of defence which alleges a payment by the defendant of part of the amount, and that thereupon the plaintiffs agreed to cancel and surrender the note, is not sufficient. *Kirkpatrick vs. Wensch*, 279.

8. An affidavit of defence set forth that the notes in suit were given for lumber which defendant was to sell for payee on commission, and that there was an agreement made at same time that if the lumber was not sold when notes matured, then the payee was to take care of them and have them renewed, and that the endorsee, who was the plaintiff, knew of this agreement, and had taken the notes as a collateral security for a pre-existing indebtedness.

Held, That if the notes were to be regarded as accommodation notes, then the endorsee could recover even though they were pledged as a collateral security for a pre-existing indebtedness, and he knew of the agreement between the parties.

9. That if the notes were to be regarded not as accommodation notes, but as given in the usual course of business, then the parol agreement merely affected the time of payment of the note, and not the consideration, and for that reason was inadmissible in evidence.

10. That the affidavit was defective in not showing due and reasonable diligence on the part of the defendant in selling the lumber. *Hewett vs. Bright*, 345.

11. It is no defence to a suit on an accommodation note, brought by the endorsee against the maker, that the endorsee purchased it for a less sum than its face called for. *Leib vs. Lanigan*, 353.

12. When one puts his name on the back of negotiable paper before the payee has endorsed it, he assumes the legal relation of second endorser. To make him liable to any holder, the implied condition that the payee shall endorse before him must be complied with to give him recourse against the payee. *Swain vs. Halberstadt et al.*, 160.

See **LIABILITY, IRREGULAR ENDORSEMENT.**

PROPERTY OWNERS. See **NAVIGABLE RIVER.**

PROTHONOTARY. See **JUDGMENTS.**

PUBLICATION. See **CHARTER.**

QUARTER SESSIONS.

1. Upon presentation of petition asking for the appointment of road viewers for a double purpose after their appointment the Court of Quarter Sessions has full power to allow such amendments in said petition as will remedy defects. *Road in Hempfield Township*, 151.

2. The Court of Quarter Sessions of Schuylkill County has jurisdiction to lay out streets and roads in the borough of Pottsville.

3. When the first day of the term of said court fell on Monday, 1st June, it was held that a report of viewers opening a street, filed on 22d June, was in time.

4. After the width of a road is fixed by the court, one term should intervene before the report is confirmed, to allow time to file exceptions or ask for a review. *In re Widening Norwegian Street*, 404.

QUO WARRANTO.

Under section 2, act June 14, 1836 (P. L., p. 1206), any person duly elected to a
[*Original Edition*, p. 428.]

QUO WARRANTO—(Continued).

township or county office, and qualified, is competent and has the right to file his suggestion, without the intervention of the Attorney General, for a writ of *quo warranto* against the person intruding or unlawfully holding the office. *Commonwealth vs. Stuckrath*, 338.

***RAILROADS.**

1. The draft required to be filed upon presentation of petition, asking for the appointment of viewers to assess damages occasioned by the running of a railroad, is within the costs and expenses to be paid by the railroad company, especially when the filing of the same is requested by the company. *Seiber vs. Railroad Co.*, 59.

2. A railroad company formed by the consolidation and merger of two or more railroad companies, is responsible for the debts and liabilities of each of the merging roads arising prior to such consolidation.

3. A provision in the charter of a railroad which makes it subject to the provisions and restrictions of the act of February 19, 1849, limits its right to charge for toll and motive power, when the cars used for transportation over the road are owned or furnished by others, to two cents for each car, and three cents for each ton per mile carried, but does not limit it to FREIGHT charge if it furnish the car. *Root & Rust vs. Railroad Co.*, 134.

4. Plaintiff bought a ticket over defendant's road, rode part of the distance, stopped over without permission, and tendered the same ticket for the remainder of the distance. The conductor took up the ticket, refused to return it, demanded fare, and upon refusal to pay until the ticket was returned, ejected the plaintiff. Held, that the defendants were not entitled to the ticket and the fare too, and that the ejectment of the plaintiff was unlawful. *Vankirk vs. Railroad Co.*, 165.

5. A subscription to stock of a proposed railroad, made upon a blank sheet of paper, which, it was stipulated, should not be binding or be attached to the "heading" (which contained the terms of the association) until the subscriber had inspected and approved of that instrument, is not binding until that assent.

Semble: That there can be no valid subscription to the stock of a company incorporated under act of April 4, 1868, without the payment of ten per cent. by each subscriber. *Bucher vs. Railroad Co.*, 219.

6. Judicial authority has settled that a railroad is not real estate within the intentment of the tax laws, and its depots, places to hold cars, and other places and buildings indispensably necessary to the construction of the road, are incident to it, parts of it, and not separately taxable as real estate.

7. There being no legislation authorizing the assessment of county rates upon railroads or parts thereof, the lot, repair-shop, turntable and roundhouse of the company cannot be assessed for such purposes. *Venango County vs. Railroad Co.*, 300.

8. Where a railroad company agreed with the landowners over whose land the road crossed, that in consideration of paying no damage for the right of way, the landholders might remove all coal beneath the road-bed—the landlords to first give written notice to the company when they were ready to move the coal, at which time the company were to either change the route—or secure the road from damage—such an agreement is not illegal or against public policy so as to relieve the company from the obligation of performing their contract.

9. The landowners will not be permitted to mine out all coal beneath a railroad so as to endanger the travelling public.

10. Railroads are private corporations.

11. Previous to the act of April 11, 1862, a railroad company having once selected the location of their road could not change it, against the consent of the owner of the land, for the exercise of eminent domain being derogatory to private right the authority must be strictly construed. But the company might change with the consent of the landowner. *Lippincott et al. vs. Railroad Co.*, 310.

12. The act of April 4, 1868, enacting that persons engaged about the premises of a railroad company, although not employed by the company itself, should only have the same right to recover against the railroad for an injury as one of its employes would have, is constitutional. *Kirby vs. Railroad Co.*, 357.

See DAMAGES, LACHES.

RATIFICATION. See CORPORATION.**REAL ESTATE.**

The purchaser of real estate where the sale is made subject to existing liens, may set up the defence of usury to the payment, *pro tanto*, of a judgment which

[*Original Edition, p. 429.]

REAL ESTATE—(Continued).

was entered against the property at the time of his purchase, part of the consideration of which is shown to be usurious. *Bank vs. Wren et al.*, 274.

See EVIDENCE, TAXES, RAILROADS.

RECEIVER.

1. A receiver, after he has obtained possession of the assets, may, on his sale of them, maintain an action in his own name against the purchaser.

*2. If the purchaser is a creditor of the firm he has no right of set-off at such receiver's sale. *Singerly vs. Fox*, 50.

RECOGNIZANCE.

When a defective recognizance has been entered on an appeal by a treasurer of a school district, the proper course is to call upon the appellant by rule to perfect his bail within a specified time. *Hummel vs. Ephrata School District*, 37.

RECORD.

The record of a justice of the peace should show affirmatively everything necessary to give him jurisdiction. *Yeich vs. Peterson & Carpenter*, 249.

See JURISDICTION, JUSTICE OF THE PEACE, JUDGMENT.

REMEDY.

Where several remedies are given, the party entitled to them may select that which is best calculated to serve his ends. *Morris et al. vs. Hannick*, 187.

RENT.

The amount of the rent due and in arrear should always be endorsed on the writ of possession. *Trimboth et al. vs. Patterson et al.*, 226.

REPORT OF VIEWERS. See **QUARTER SESSIONS.****RESERVED POINT.** See **VERDICT.****RESIDUARY LEGATEE.**

A will was witnessed by two subscribing witnesses, and a blank was left for the name of the residuary legatee, this was afterwards filled up, but as the subscribing witnesses were not able to testify this fact, *Held*, that, as to the residuary devise, the will was not duly proved. *Derr vs. Greenawald*, 269.

RESPONSIBILITY. See **LACHES.****RETAINING PROPERTY.** See **JUDGMENT NOTE.****RIGHT OF WAY.** See **LANDLORD AND TENANT.****ROADS.**

Under the act of 1860, requiring the making and repairing of roads in Schuylkill county, to be sold at public outcry to the lowest bidder, supervisors have no authority to make private contracts for the making or repairing of the public roads.

After a private contract made by the supervisor of a township, for the making or repairing of a road has been pronounced illegal by the courts, an act of the legislature, directing the auditing and settling of a claim arising under such contracts, is an attempt to exercise judicial powers, and a departure from the function of legislation. *Cooney et al. vs. Norwegian Twp.*, 291.

See **QUARTER SESSIONS.**

RULE OF REFERENCE. See **page 234.****SABBATH.**

The coaling of locomotives, engaged in transporting live stock, on Sunday, being a work of necessity and charity, is excusable. *Commonwealth vs. Conway*, 303.

SCIRE FACIAS.

After pleading payment to a scire facias on a mechanic's lien, no question as to the sufficiency of the lien can be raised. *M. Clair Coal Co. vs. Marts*, 83.

SCHOOL DISTRICTS. See **TAXES.****SCHOOL TAXES.** See **TAXES.****SELLING LIQUOR WITHOUT LICENSE.**

1. A married woman cannot be convicted for selling liquor without license where the same is done in the presence of her husband.

[*Original Edition, p. 430.]

SELLING LIQUOR WITHOUT LICENSE—(Continued).

2. The husband would be coercively present if in the house, though not in the room, where the selling was going on. *Commonwealth vs. Lindsey*, 216.

SERVICE.

1. What is legal service of summons on an agent under section 1, act May 4, 1852?

*2. To hold non-resident defendants by a service on an alleged agent, the return of the officer must show that he complied with the act by serving the summons at the place, or one or other of the places mentioned in the act. *Yeich vs. Peterson & Carpenter*, 249.

See JUDGMENT, SHERIFF.

SET-OFF.

The right of set-off dates from the time that defendant had notice. One defendant may set off his individual claim against a joint claim against him and another. *Miller & Reist vs. Kreiter*, 247.

SHERIFF.

A party, when sued, may appear in court in person and waive service, or he may employ counsel to enter an appearance for him, and in either case service by sheriff is dispensed with. Where, however, a sheriff, in whose hands a summons is placed for service, prevails upon an attorney (who was in no way authorized) to accept service for the defendant and judgment by award of arbitrators is obtained against said defendant who was not served with summons, the award and judgment will be set aside.

The fact that the attorney notified the defendant by letter of the acceptance of service does not alter the case. *McPherson's Administrators vs. McPherson*, 314.

See INQUISITION, MECHANICS' LIEN.

SHERIFF'S SALE. See FI. FA.

SIC UTERE TUO. See ADJOINING LAND, NAVIGATION.

SOLDIER. See EXEMPTION, EXECUTION.

SPECIAL ACT.

The new constitution does not affect the taking of land under a special act passed before its adoption. *Wister vs. City*, 66.

STATE STREET.

A title which calls the bill a supplement to another bill, which has no other title than of the same kind, a supplement to an original bill, does not clearly express the object of the law, and imparts no information to the legislature which is called upon to enact it.

The act of January 2, 1871, entitled "a further supplement to the act incorporating the city of Harrisburg, in the county of Dauphin, passed April 9, 1869," is defective in title, contains several distinct subjects, and is unconstitutional and void. *In re State Street, Harrisburg*, 1.

STATUTE OF LIMITATIONS.

The statutory period of six months bars a recovery by attachment of excessive interest paid the garnishee by the defendant in the attachment. *Good vs. Grant et al.*, 175.

See DEBT.

STAY OF EXECUTION.

Appearance is a waiver of notice to appear in an application for a stay of execution.

In calculating the thirty days allowed by law to enter bail for a stay, the day on which judgment is entered is excluded. *Gass vs. Iron Co.*, 224.

See SURETY.

STOCK.

The question whether the stock was tendered to defendant within a reasonable time after it was discovered to be worthless, the transaction being between parties unaccustomed to stock dealing, was left to the jury. *Held*, not to be error. *Laubach vs. Laubach*, 104.

See RAILROADS.

[* Original Edition, p. 431.]

STOCKHOLDERS. See **MASTER'S REPORT.**

STRAY CATTLE.

In a proceeding under the act of 13th April, 1807, relating to stray cattle, want of notice to the owner of the stray will work a forfeiture of all damages. *Kelly vs. Stephens*, 308.

SUBLETTING. See **LANDLORD AND TENANT.**

SUBMISSION.

After the execution of the submission it is beyond the control of either party and cannot be revoked. *Shisler vs. Keavy*, 39.

SUBPENA. See **WITNESS' COSTS.**

***SUMMONS.** See **SHERIFF.**

SUPERVISORS. See **ROADS.**

SUPPLEMENT. See **BILL.**

SURETY.

1. The notice required to be given by surety to a principal in order to discharge him from undoubted legal liability should be clear and explicit to proceed and collect the debt. *Donough vs. Boger et al.*, 195.

2. If a surety signs and delivers his bond on the express condition that his co-sureties should sign it, unless such condition is complied with, it cannot be enforced. Express assent to such condition by the obligee is not necessary. *Warfel vs. Frantz et ux.*, 227.

3. In a judgment against a principal and sureties, parties had voluntarily incurred liabilities as sureties for stay of execution for all the defendants although only solicited on the part of the principal, and at the expiration of the stay had paid the debt to the plaintiff and then sought substitution against the surety defendants. *Held*, they were without right to the claim. *Titzel vs. Smeigh et al.*, 251.

See **DECEDENT, PROMISSORY NOTE.**

SURFACE OWNER.

The owner of the surface has a right to subjacent supports—but this may be qualified by his conveyance. *Lippincott vs. Railroad Co.*, 310.

TALESMAN.

Under an order for a *tales de circumstantibus* the sheriff may summon the talesmen from either the bystanders or the body of the county, or both. The 41st sec. of the Crim. Procedure act of March 31, 1860, construed. *Brown vs. Commonwealth*, 180.

TAXES.

1. Persons liable to military duty under the act of May 4, 1864, were subject to the *per capita* tax authorized by the act of February 17, 1865. *Drumheller vs. Keim*, 21.

2. School districts are entitled, under the act of May 8, 1853, to the FULL AMOUNT of all taxes collected on unseated lands, returned by the collectors of the school tax to the commissioners of the county. No reduction can be made on account of commission to the county treasurer.

3. Settlements of treasurer's accounts by the county auditors allowing a special or other commission out of moneys collected for a school district are not binding upon the district. School districts and other creditors of a county, are not parties to such settlements, and therefore are not affected by them. *Conyngham School District vs. Columbia Co.*, 30.

4. Fixing a rate is not charging the land with a tax, though the rate is essential to the charge. *Greenough vs. Fulton Coal Co.*, 61.

5. In a proceeding by bill in equity to restrain the collection of school taxes, the court will not inquire into the validity of the appointment of the collector, he having given bond with sureties approved as required by law.

6. The act of May 8, 1854, did not establish a fixed rate of taxation for school purposes. It merely provided a standard, by which the MAXIMUM rate could be ascertained at the time the tax is levied; to wit, the amount of both State and county taxes, authorized by law.

7. The act of Feb. 23, 1866, exempting real estate from the three-mill tax for State purposes, operated as a reduction of a like amount on that species of property for school purposes.

8. A levy of thirteen mills on real estate is three mills in excess of what the

[*Original Edition, p. 432.]

TAXES—(Continued).

law allows. The collection of such excess may be restrained by injunction. *Locust Mountain Coal & Iron Co. vs. Curran et al.*, 231.

9. Since the passage of the act of Feb. 23, 1866, P. Laws, 83, exempting real estate from taxation for State purposes, the maximum for school purposes on real estate is ten mills on a dollar, to be applied to the payment of *salary, books, stationary, lights, fuel, repairs*, and other incidental and ordinary expenses of the public schools.

10. The special (or building) tax is solely for the purchase of grounds and buildings, and cannot be used for repairs and improvements of old erections. *Zimmerman vs. Tracy et al.*, 277.

See **RAILROADS**.

TESTIMONY.

Testimony irrelevant for one purpose, may be admissible for another. *McFerrer vs. Mont Alto Iron Co.*, 206.

TIMBER. See **DAMAGES**.

***TITLE, i. e., NAME.**

1. The name of a town or incorporated borough cannot be exclusively appropriated by one person as a trade mark, where the same kind of goods are manufactured by others in the same place.

2. The fact that the name was adopted as a trade mark before the town was incorporated, makes no difference. *Glendon Iron Co. vs. Uhler et al.*, 178.

See **BILL**.

TITLE. See **EXECUTION, INJUNCTION, POSSESSION**.

TOLL. See **CONSIGNEE, RAILROAD**.

TRADE MARK.

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TRAVERSER.

The inquisition stands until overthrown by the evidence of the traverser. *McGuinness vs. Commonwealth*, 40.

TREASURER.

When a defective recognizance has been entered on an appeal by a treasurer of a school district, the proper course is to call upon the appellant by rule to perfect his bail within a specified time. *Hummer vs. Ephrata School District*, 37.

See **TAXES**.

TRESPASS.

An action of trespass may be maintained, if a corporation takes land for public use before entering a bond for compensation. *Dimmich vs. Broadhead*, 126.

TROVER. See **JURISDICTION**.

TRUST. See **DECEDENTS' ESTATES**.

UNDUE INFLUENCE. See **WILL**.

USURY.

1. The purchaser of real estate where the sale is made subject to existing liens, may set up the defence of usury to the payment, *pro tanto*, of a judgment which was entered against the property at the time of his purchase, part of the consideration of which is shown to be usurious.

2. The defence of usury may be raised by others than the borrower himself. *Bank vs. Wren*, 274.

VENDUE. See **JUDGMENT, CONTRACT**.

VERDICT.

1. Where the verdict is not in itself insensible, it is not vitiated by the finding of superfluous matter by the jury. *Commonwealth vs. Ceary*, 145.

2. When a verdict is taken subject to a reserved point, the verdict should be for the plaintiff. *Lippincott vs. Railroad Co.*, 310.

See **JURY PRACTICE**.

[*Original Edition, p. 433.]

VESSEL. See CONTRACT.

VIEWERS. See QUARTER SESSIONS.

VOTING ILLEGALLY. See ATTEMPT TO VOTE ILLEGALLY.

WAIVER.

Parol testimony is admissible to establish the existence of a waiver of condemnation, which had been a record and become lost. *Hamberger vs. Brooker et al.*, 96.

See STAY OF EXECUTION.

WIDOW.

Where a testator devised real estate to his wife for life, directing it to be sold on her death, and the proceeds to be distributed, and the widow declined to take under the will, petitioning for partitioning and valuation under act of April 20, 1869. (Brightly, 530.)

Held, 1. That the court had jurisdiction in such a case.

2. That the sale could not take place immediately, without awaiting her death.

3. That the legatees cannot take at their valuation unless all are agreed. *Gallagher's Estate*, 144.

*4. A widow, electing to take against the will, takes nothing specifically, but under and through the executor. *Gallagher's Appeal*, 217.

See PARTITION, WILL.

WILL.

1. Where a will provides that an executor is "to have the control and management of all the affairs of the farm devised, and of keeping together the property during the life of the widow, and keep her provided for so long as she shall live or remain his widow, and to sell and dispose of such property as may be in the judgment of the executor necessary, from time to time, in the management of the farm and for the comfortable support of the widow, and as soon as she ceases to be his widow the property is to be sold and the proceeds divided equally among his children and heirs, the same as at her death," etc., upon an election by the widow not to take under the will, upon the application of one of the heirs an inquest was awarded. *Birth's Estate*, 7.

2. The undue influence which would be sufficient to destroy a will must be something more than mere importunate persuasions. *Twomey vs. Long et al.*, 245.

3. Heirs at law cannot be disinherited by merely negative words in a will; there must be a devise to another to effect that purpose.

4. Where a will duly executed appoints executors and authorizes them to sell the property, the power of the executors to act and sell is not taken away by the fact that the only devise of property in the will is void.

5. A will authorizing executors to sell the property, will authorize a sale of the real estate. *Zerbe vs. Zerbe*, 287.

See DECEDENTS' ESTATES, WIDOW, PAROL EVIDENCE, RESIDUARY LEGATEE.

WITNESS.

1. The act of 1869 disqualifies a party as a witness when the other party is dead, although he would not have been disqualified prior to that act.

Briggs, J., and Thayer, J., concurring; Hare, P. J., and Mitchell, J., dissenting. *Sheetz et al vs. Hanbest*, 103.

2. In an indictment where a felony and a misdemeanor are joined, neither the defendant or his wife is a competent witness, under the act of April 3, 1872. *Commonwealth vs. Ceary*, 145.

3. A party competent prior to the passage of the act allowing parties an interest to testify, is not rendered incompetent by that act. *McFerren vs. Mont Alto Iron Co.*, 206.

4. Where accounts are multitudinous the witness may be allowed to refresh his recollection by means of other accounts and papers as to the items. *Insurance Co. vs. Hanlon*, 270.

See RESIDUARY LEGATEE, WITNESS' COSTS.

WITNESS' COSTS.

Witnesses attending without subpoena, and not called to testify, are entitled to their costs where a subpoena had been taken out but they waived its service, and where there was no allegation that their testimony was not needed. *Lagrosse vs. Curran*, 155.

[*Original Edition, p. 434.]

WRIT.

It seems that there can be no *testatum* writs of execution against a corporation. The act of 1870 provides for none.

A *fi. fa.* was issued, immediately returned *nulla bona* and a *testatum* issued to the same return day. The latter writ held irregular and set aside. *Root & Rust vs. Railroad Co.*, 134.

See EXECUTION.

WRIT OF POSSESSION.

The amount of rent due and in arrears should always be endorsed on the writ of possession. *Trimball et ux. vs. Patterson et al.*, 226.



